Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADZIC,

Petitioner,

vs.

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Respondents,

and

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether claims by aliens in former Yugoslavia against the political leader of a faction in former Yugoslavia, proclaimed to be the Bosnian Serb Republic of Srpska but not recognized by any other nation, based on alleged violations in former Yugoslavia by Bosnian Serb armed forces of the law of nations and international treaties, conventions and protocols governing genocide, war crimes and crimes against humanity are cognizable in the United States courts under the Alien Tort Statute or the federal question jurisdiction statute.

2. Whether the conduct of a non-state actor can constitute a violation of the law of nations or of international treaties, conventions and protocols even if not self-executing against genocide, war crimes, and crimes against humanity, and if so, whether they can serve as the basis for imposing civil liability in a private action under the Alien Tort Statute or the federal question jurisdiction statute when the law of nations and relevant treaties are concerned only with criminal responsibility for violations of state actors in courts with jurisdiction.

3. Whether the alleged acts of torture and summary execution for which respondents seek to hold petitioner liable were committed under actual or apparent authority or color of law of a foreign nation for purposes of the Torture Victims Protection Act and are otherwise cognizable under that Act.

4. Whether this case should be dismissed because it is nonjusticiable or presents political questions inappropriate for judicial determination or both.

5. Whether the essential functions of the United Nations are protected by immunity from service of process to persons such as petitioner during trips to United Nations Headquarters in New York solely to participate in peace negotiations or other essential functions at the urgent request of officials of the United Nations and the United States.

6. Whether the assertion of jurisdiction by a United States court in this case over parties living in former Yugoslavia with no presence or property in the U.S. and over conduct occurring in former Yugoslavia having no connection with the United States depending entirely on questionable service of process during two brief trips to participate in peace negotiations at the United Nations violates due process of law under the Fifth Amendment and exceeds the powers of the federal courts under Article III of the Constitution.

7. Whether this action should be dismissed on grounds of forum non conveniens.

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Opinions in the Case

The opinion of the Court of Appeals deciding the appeals in Kadic v. Karadzic and Doe v. Karadzic is reported at 70 F.3d 232 (2d Cir. 1996), A1; its decision denying rehearing is reported at 74 F.3d 377 (2d Cir. 1996), A41. The District Court's opinion is reported at 866 F.Supp 734 (SDNY 1994), A45.

Basis for Jurisdiction

The judgments sought to be reviewed were entered on October 13, 1995. The orders denying petitioner's timely petition for rehearing were filed on January 26, 1996, A66, based upon a decision denying rehearing that was date stamped "JAN-4 1996" on the typewritten copy received by petitioner from the Court of Appeals and entered on the Court's docket as filed on January 4, 1996 (as a "nondispositive opinion"), but is reported as decided on January 6, 1996, 74 F.3d 377 (2d Cir. 1996), A41. 28 U.S.C. §1254(1) is the statutory provision which confers jurisdiction on this Court to review the judgments in question on a writ of certiorari.

Constitutional Provisions, Statutes and Treaties Involved

This case involves the due process of law provisions of the Fifth Amendment to the U.S. Constitution and the provisions of Article III with respect to the scope of the powers of federal courts in cases having no nexus with the United States.

28 U.S.C. §1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The Torture Victim Protection Act of 1991, Note following 28 U.S.C. §1350:

Section 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991.

Section 2. Establishment of civil action.

(a) Liability. -- An individual who, under actual or apparent authority, or color of law, of any foreign nation --

(1) subjects an individual to torture shall, in civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies. -- A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations. -- No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Section 3. Definitions.

(a) Extrajudicial killing. -- For the purposes of this act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture. -- For the purposes of this Act --

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain and suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) Mental pain or suffering refers to prolonged mental harm caused by or resulting from --

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Other Federal Statutes involved include: the Genocide Convention Implementation Act of 1987, 18 U.S.C. §1091 (1988) and the Torture Convention Implementation Act of 1994, 18 U.S.C. §2340-40(B).

Numerous international treaties, conventions and

protocols are advanced by respondents in support of their actions; some of these are quoted in part or cited by the Court of Appeals, see e.g. re: genocide, A16-19, war crimes, A19-22; torture and summary execution, A22-23.

Statement of the Case

In February and March 1993 petitioner, Radovan Karadzic, made three brief trips from former Yugoslavia to New York at the urgent invitation of high level officials of the United States and the United Nations including President Clinton and U.N. Secretary General Butros Butros Ghali for the sole purpose of participating as President of the newly proclaimed though not internationally recognized Bosnian-Serb Republic in peace negotiations at the United Nations headquarters in New York seeking to bring the war in former Yugoslavia to an end.

There was considerable official and public opposition to the issuance of a visa permitting petitioner to enter the United States, leading Assistant Secretary of State Richard Boucher to explain at a press briefing on February 2, 1993 that his admission was required by the Headquarters Agreement:

> MR. BOUCHER: We have approved a C-2 visa, which relates to U.N. activities, for Radovan Karadzic, so that he can participate in the continuing negotiations of the International Conference on the Former Yugoslavia, meetings which are going to be held at the United Nations in New York.
>
> * * *
>
> ... He's coming here because the U.N. mediators and negotiators felt it was important that he be here to participate in U.N. activities. And, of course, we have an obligation under the Headquarters Agreement that we have with the United Nations to permit entry of people who are invited to U.N. Headquarters for official business.

The next day Mr. Boucher announced that further restrictions would be imposed on petitioner's movements:

> MR. BOUCHER: Yesterday, as I was speaking on this subject, there were discussions continuing in this building on the exact restrictions to be placed on Mr. Karadzic's visa.
>
> The normal restriction on the C-2 visa, which is transit to the United Nations, is a 25-mile limit. But for purposes of security, we've asked the Immigration and Naturalization Service to place further restrictions on Mr. Karadzic's travel in the United States. We expect that his travel will be restricted to direct transit to and from U.N. Headquarters and to movement within a 10-block radius of U.N. Headquarters.

During these trips the United States government provided petitioner with a large 24 hour a day protective force from the moment of his arrival to his actual departure through federal law enforcement officers of the Diplomatic Security Service of the State Department. These trips are the only contacts with, or presence in the United States by any of the parties. No party is alleged to have property in the United States.

At the end of the first trip, on the evening of his departure, as petitioner exited from the hotel restaurant and crossed the lobby to the elevator surrounded by his security detail, a man who had been sitting in the lobby approached the security detail and made a dangerous effort to serve papers, shouting and reaching into his coat for what turned out to be papers and dropping them to the floor as he was seized by U.S. agents and prevented from reaching petitioner. This is the service of process claimed by plaintiffs in Doe v. Karadzic.

During his second trip to New York, papers in Kadic v. Karadzic were delivered to Radovan Karadzic by the head of the security detail as provided in an order issued under seal by

the federal District Court in Manhattan.

Both of these actions against petitioner were brought by persons and classes of persons living in former Yugoslavia who alleged they were victims or representatives of victims of atrocities committed in former Yugoslavia by Bosnian and Serb armed forces during the course of the war in or near Bosnia and Herzegovina for which they allege petitioner was responsible. Jurisdiction was alleged under the Alien Tort Statute, the Torture Victim Protection Act ("TVPA"), federal question jurisdiction, 28 U.S.C. §1331 and supplemental jurisdiction, 28 U.S.C. §1367. The complaints charged petitioner with alleged violations of the law of nations, and numerous statutes and international treaties, conventions and protocols. Plaintiffs sought damages and in Kadic also sought injunctive relief.

Petitioner moved before answer to dismiss the complaints under Fed.R.Civ.P. 12(b)(1), (2), (4), (5) and (6) on grounds of lack of subject matter and personal jurisdiction, including immunity as an invitee of the United Nations, insufficiency of process and service of process and nonjusticiability of plaintiffs' claims.

In an opinion reported at 866 F.Supp. 734 (S.D.N.Y. 1994), A45, the District Court dismissed both actions for lack of subject matter jurisdiction.

Respondents appealed. Following oral argument, the Court invited the Attorney General of the United States to submit the views of the United States. The United States filed a statement of interest which argued for reversal and remand, taking Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) as its starting point as "the law of this Circuit concerning the Alien Tort Statute," at 4, but did so on grounds much narrower than the grounds that respondents espoused and the Court of Appeals ultimately adopted.

The United States took the position that the District Court erred in dismissing all of plaintiffs' claims on the ground petitioner is not a state actor. It deemed this error to require reversal, at 14, in order for the District Court on remand to determine an issue the Court of Appeals subsequently decided itself, i.e. "whether the claims based on violations of customary international law governing genocide, war crimes, and crimes against humanity alleged by plaintiffs are otherwise properly cognizable in a suit brought under the Alien Tort Statute." Id.

And the United States took the view that respondents' claims of violations of several international conventions "are not actionable on their own under the Alien Tort Statute because these conventions are not self-executing," at 15.

The United States failed to address the viability of respondents' claims under the TVPA and their assertion of federal question jurisdiction, but it addressed the issue of forum non conveniens to stress the general importance of the doctrine "in cases such as these where the parties and the conduct alleged in the complaints have as little contact with the United States as they have here." at 18.

In an opinion reported at 70 F.3d 232 (2d Cir. 1996), A1, the Court of Appeals reversed the District Court, upholding subject matter jurisdiction under the Alien Tort Statute and the TVPA, without reaching federal question jurisdiction under §1331. The Court rejected petitioner's claims for immunity from service of process under the U.N. Headquarters Agreement and under federal common law. It remanded the case for further proceedings.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. The panel denied the petition in an opinion reported at 74 F.3d 377 (2d Cir. 1996), rejecting the thesis advanced by Prof. Sweeney in A Tort Only In Violation Of The Law Of Nations, 18 Hastings Int'l. & Comp. L. Rev. 445 (1995), that the scope of the Alien Tort Statute should be limited in accordance with the original intent of the draftsmen

in 1789 to damages in prize cases. The Court noted that "however we might have construed the Alien Tort Act in a case arising in 1789," its interpretation two hundred years later was guided by the controlling case in the Second Circuit Filartiga v. Pena-Irala, supra, and by the Court's view that Congress codified Filartiga and extended it to U.S. citizens in the TVPA in 1991. No vote was requested or taken on the suggestion for rehearing en banc.

This petition follows.

Reasons for Granting the Writ

I. The Decision Below Is In Conflict With Decisions Of This Court, Other Circuits And Acts Of Congress

After two centuries of virtual non-use the Alien Tort Statute has been invoked as the jurisdictional basis for tort actions against individuals who were foreign government officials alleged to be responsible for tortious acts such as official torture held to be violations of the law of nations. See Filartiga v. Pena-Irala, supra, now cited in more than 30 cases by the federal Courts of Appeals, 40 cases by the federal district courts and over 365 texts and periodicals. For a recent case following Filartiga and the decision of the Court of Appeals below, see Abebe-Jira v. Negewo, 72 F.3d 844, 847-48 (11th Cir. 1996).

This Court has not considered this development. It has referred to Filartiga in only one case, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433, 436 (1989), in which this Court rejected the Second Circuit's ruling, 830 F.2d 421, based in part on Filartiga, that jurisdiction could be exercised over Argentina as a defendant under the Alien Tort Statute after enactment of the comprehensive Foreign Sovereign Immunities Act ("FSIA").

In the present case, the Court of Appeals has extended

Filartiga's rule which held official acts may violate the law of nations, to hold

> certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. A12.

The Court of Appeals did not reach the issues whether there is jurisdiction under 28 U.S.C. §1331, or 28 U.S.C. §1367.

The decision conflicts with Sanchez-Espinosa v. Reagan, 770 F.2d 202 at 206-7 (D.C.Cir. 1985), where alien plaintiffs alleged Contras carried out scores of attacks upon innocent Nicaraguan civilians, summary executions, murder, rape and other acts:

> We are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals. As for the law of nations -- so called "customary international law," arising from "the customs and usages of civilized nations," The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900) -- we conclude that this also does not reach private, non-state conduct of this sort for the reasons stated by Judge Edwards in Tel-Oren v. Libyan Arab Republic, 726 F.2d at 791-96 (Edwards J., concurring); see also id. at 807 (Bork, J., concurring).

See, Tel-Oren v. Libyan Arab Republic 726 F.2d 774 (D.C.Cir. 1984), cert. denied, 470 U.S. 1003 (1985):

> The question therefore arises whether to stretch Filartiga's reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law. The extension would

> require this court to venture out of the comfortable realm of established international law -- within which Filartiga firmly sat -- in which states are the actors. 726 F.2d at 792, Judge Edwards, concurring.

See also, Hamid v. Price Waterhouse, 51 F.3d 1411, 1417-18 (9th Cir. 1995), discussing but not reaching the issue whether the law of nations applies to purely private conduct.

The District Court below which was reversed by the Court of Appeals held that it lacked subject matter jurisdiction because acts committed by individuals, non-state actors, do not violate the law of nations and therefore are not cognizable under the Alien Tort Act. It also rejected jurisdiction under the Torture Victims Protection Act, 28 U.S.C. §1331 and 28 U.S.C. §1367. Its careful and detailed analysis correctly states the law. See A45 et seq.

The decision of the Court of Appeals below is in conflict with decisions of this Court and relevant acts of Congress. As an illustration, the Torture Victims Protection Act which has been called a partial codification of Filartiga, applies as the District Court held in rejecting respondent's claims of jurisdiction under the TVPA, A59 et seq., only to acts "under actual or apparent authority, or color of law, of any foreign nation." TVPA, Sec. 2(a). It also requires a plaintiff to exhaust remedies in the nation where the conduct alleged occurred. Id. Sec. 2(b). Despite these provisions, the Court of Appeals has held the alleged atrocities, including torture, actionable under the Alien Tort Statute "without regard to state action, to the extent they were committed in pursuit of genocide or war crimes...." A23.

This is the same error the Court of Appeals had made in Argentine Republic v. Amerada Hess, supra, where this Court rejected the Court of Appeals analysis and reversed its decision stating:

> The Court of Appeals reasoned that Congress' enactment of the FSIA was not meant to eliminate "existing remedies in United States courts for violations of international law" by foreign states under the Alien Tort Statute. 486 U.S. at 433.

After "having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court," this Court examined the FSIA to see if any exemptions applied. 488 U.S. at 493. Amerada Hess cited the exception in FSIA for non-commercial torts, §1605(a)(5) as most in point. This Court held the statute was limited by its own terms and applied only to injuries occurring in the territorial jurisdiction of the United States. 488 U.S. at 440-41. As against a sovereign and persons acting under its authority, tort claims for injuries occurring outside the territorial jurisdiction of the United States arising from violations of the law of nations brought in federal courts are barred by the FSIA. Argentine Republic v. Amerada Hess, supra; see Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 713-23 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); cf. In Re Estate of Marcos, 25 F.3d 1467, 1468-76 (9th Cir. 1994), cert. denied, 115 S.Ct. 934, 130 L.Ed.2d 879 (1995).

The same approach taken in Filartiga is taken by the Court below regarding the Genocide Convention Implementation Act of 1987, 18 U.S.C. §1091 (1988) which criminalizes acts of genocide. The Act provides that it "shall not be construed as creating substantive or procedural rights enforceable in any proceeding." §1092. Yet the Court of Appeals holds acts of genocide by private persons are actionable under the Alien Tort Statute. Because the Genocide Convention imposes criminal sanctions which demand personal responsibility for violations, it includes private individuals who violate its provisions. As at Nuremberg, such private individuals are included only when acting in concert with the state. The decision below conflicts directly with Amerada Hess on these issues.

The reference in the legislative history of the TVPA to 42 U.S.C. §1983 for aid in the interpretation of the meaning of its use of the phrase "color of law" is instructive. Congress limited the reach of §1983 to state action, or action under color of law, which includes concerted action and acts in symbiotic relationship between the state and private individuals. This is a standard common to all our civil rights laws for important reasons of federalism.

The decision below violates clearly established principles embodied in §1983 and conflicts with innumerable decisions thereunder. Purely private conduct, no matter how wrongful, is not reached by §1983. See, NCAA v. Tarkanian, 488 U.S. 179, 191 (1988). The Court of Appeals decision provides redress for aliens in U.S. courts for human rights violations committed by private actors in foreign nations that is denied under our civil rights laws to U.S citizens similarly injured by private actors within the U.S.

In addition, no treaty relied on by the appellants is self executing and therefore no treaty can be the basis for federal jurisdiction directly, or under the Alien Tort Statute. See Statement of Interest by the United States, pp. 15-18. The decision below conflicts with the implementation acts of the treaties relied upon.

Congressional assertions are clear and consistent that these treaties do not provide a basis for civil actions in the U.S. and that Congress believed no other basis for jurisdiction existed, otherwise its assertions are meaningless. See, Torture Convention, 18 U.S.C. §§2340-2340(B), at §2340(B) (1994); Genocide Convention, 18 U.S.C. §§1091-1092 at §1092 (1988). This decision conflicts with those Congressional acts.

The implementation acts for these treaties show that Congress did not believe a private remedy was "already available under the Alien Tort Act." After 200 years there was no existing law which might have suggested to the Congress that such private remedies were available for private non-state

acts. By their very nature, the conduct addressed in these conventions is the conduct of state actors. It makes no sense for Congress to close the doors of the courts of the United States to actions based directly upon these vital contemporary treaties, only to permit the treaties to be considered actionable in U.S. courts as part of the law of nations under the Alien Tort Statute or under 28 U.S.C. §1331. The Congress has consistently acted to prevent private actions for torts committed overseas, except in its codification of Filartiga in the TVPA where it requires state action and equitably adds jurisdiction for such actions when brought by U.S. citizens who are not included in the Alien Tort Statute.

The Court of Appeals' several references to authorities holding individuals responsible under international law, see e.g. A16-18, confuses individual responsibility for criminal acts with private actions for purely private conduct, failing to recognize all its references are to acts by private individuals acting under color of law. A crowning achievement of the Nuremberg principles is the establishment of individual responsibility for crimes against peace, war crimes and crimes against humanity, but every act charged against an individual, including industrialists was committed in concert with the Nazi government. Had Jack the Ripper privately plied his trade in Heidelberg during the war, he would not have been brought before the International Tribunal at Nuremberg, but before a criminal court in Heidelberg.

Reliance by the court below on international law related to piracy, slave trade, attacks on and highjacking of aircraft, attacks on ambassadors and other officials is misplaced. These are acts against all humanity because they occur in international areas, or they directly affect a nation outside its territory, or they affect more than one nation. They involve international commerce and protection of diplomatic officials outside their own country. Piracy on the high seas, unlike piracy on Lake Placid, is a concern of all nations because it cannot be controlled by the laws of any one nation. The same is true of international slave trade, attacks on international air

traffic and protection of diplomats. The interests and functions of every nation are threatened by such conduct which may be directly against its officials, ships, aircraft, or citizens and which it cannot control alone where multiple sovereignties, or foreign, or international space are involved.

The lengths to which interpretations of a long unused statute may depart from its original intent are suggested by recent research on the Alien Tort Statute. The genealogy of "[t]his old and little used section... a kind of a legal Lohengrin... no one seems to know whence it came," Friendly, C.J., ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), has been discovered finally by the exhaustive research of a prominent international law scholar. The startling conclusion is that every word in the Alien Tort Statute, including "only," counted and Congress clearly intended to cover "only" prize cases. See, Joseph Modeste Sweeney, A Tort Only In Violation of the Law of Nations, 18 Hastings Int'l & Comparative L. Rev. 445 (Spring 1995). Delightfully the hand that wrote the cryptic phrase "... for a tort only, committed in violation of the law of nations or a treaty of the United States," was Oliver Ellsworth, id. at 448.

As Professor Sweeney shows, there is no basis in the Alien Tort Statute for expanding its reach beyond its strict limitation to wrongs prohibited by the law of prize including treaties of the United States dealing with prize matters. To stretch the scope of the act to transitory tort actions arising anywhere in the world from violations of the law of nations, or treaties of the United States is beyond the wildest dreams of the Congress. Neither subsequent congressional acts nor the handful of cases brought under the Alien Tort Statute over 200 years have created a basis for expanding its original application. See David J. Bederman, The Feigned Demise of Prize, 9 Emory Int'l L.Rev. 31, 53-64 (Spring 1995); Alfred P. Rubin, U.S. Tort Suits by Aliens Based on International Law, 18 Fletcher Forum of World Aff. 65 (1994)(Filartiga "fundamentally mistook the distribution of legal powers within the current international legal order, essentially misread the

Judicature Act, and created a framework for national assertions of tort jurisdiction that the United States itself would strongly protest if used by other states against American defendants." at 66).

This Court denied certiorari in Tel-Oren after requesting and receiving a brief from the United States urging denial of certiorari, 24 I.L.M. 427 (1985); see also Comment, Enforcing the Customary International Law of Human Rights in Federal Court, 74 Calif. L.Rev. 127, 152-54 (1986). It is abundantly clear from the statement the United States filed below, that whatever its view may be on the advisability of certiorari review of the present case -- a view that may well be controlled by political rather than legal considerations -- the United States disagrees on the merits with the unqualified green light the Court of Appeals has given respondents to proceed with their claims under the Alien Tort Statute on remand. Contrary to the Court of Appeals, the United States has said the cognizability of claims under the Alien Tort Statute needs to be determined on remand, that the conventions upon which respondents rely fail to create independent causes of action in respondents' favor because they are not self-executing and that the issue of forum non conveniens is important where the parties and the conduct have so little contact with the United States.

Now, more than ever, as Judge Harry T. Edwards pleaded a dozen years ago this is "an area of the law that cries out for clarification by the Supreme Court." Tel-Oren v. Libyan Arab Republic, supra, 726 F.2d at 775.

II. This Unprecedented Vast Expansion Of The Alien Tort Statute Would Likely Place An Enormous Strain, Not Only On Our Courts, But Upon Our Country's Diplomatic Relations With Any Number Of Foreign Nations And Will Prove Futile And Frictive While Failing To Serve Justice

The breathtaking sweep of the jurisdictional claim the Court of Appeals asserts is that the Alien Tort Statute

> ... enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. A4.

All the plaintiffs are aliens living in or near Bosnia and Herzegovina. None are known to have ever set foot in the U.S. All the events, involving thousands of class action plaintiffs, unnamed and unknown, and potentially thousands of witnesses occurred in, or near, Bosnia and Herzegovina. The defendant lives, as he always has, in former Yugoslavia, though he studied poetry in the U.S. in the 1970s and made three short trips here in early 1993 to participate in continuing peace negotiations at the United Nations headquarters at the urgent request of the U.N. There is no physical presence of any party and no property, or interest in property owned by any party in the U.S.

The injuries alleged are a minuscule part of the total injuries that occurred in 1992 in former Yugoslavia, not to consider the greater violence in the following years in a widespread brutal conflict that remains the single greatest concern and responsibility of all the people, governments, courts, institutions and organizations in Bosnia and Herzegovina and surrounding nations.

Plaintiffs have made no effort to sue in Bosnia and Herzegovina, or Croatia, or elsewhere in former Yugoslavia where courts have continuously been open for both criminal and civil cases arising from the conflict.

The only physical nexus to the United States was defendant's entry here to participate in peace negotiations at the U.N. at its urgent invitations during which two efforts to serve him with process were made by plaintiffs. In Filartiga, In re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493 (9th Cir. 1992), two lead cases, as in all the prior cases involving tort claims by aliens against former government officials who were state actors, the defendants were living in the U.S. and could be found only here.

There is no precedent in which a U.S. court has asserted jurisdiction in a case with so little contact with the United States. There is no precedent in which a U.S. court has claimed jurisdiction over torts committed anywhere in the world, if brought by an alien for violations of the law of nations whether committed by state or private actors.

The FSIA, as this Court has noted, requires substantial contact with the United States where it provides a foreign sovereign no immunity from suit in the U.S.:

> Congress was aware of concern that "our court [might be] turned into small 'international courts of claims[,]'... open... to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." Testimony of Bruno A Ristau, Hearings on HR 11315, at 31. As the language of the statute reveals, Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. §1605. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983).

The FSIA also waives sovereign immunity for torts only where they occur in the United States, thus avoiding the issues and burdens arising from a claim for such jurisdiction worldwide. 28 U.S.C. §1605(a)(5). See Argentine Republic v. Amerada Hess, supra; McKeel v. Islamic Republic of Iran, 772 F.2d 582 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984).

To hold jurisdiction over an alien sued by an alien for acts entirely in another country solely on the basis of service of process on that alien during a short trip to the United Nations would implicate the Due Process Clause and offend traditional notions of fair play and substantial justice. See, International Shoe Co. v. Washington, 362 U.S. 316 (1945).

The exercise of jurisdiction over a suit in which parties are aliens, have no presence, or property in the U.S. and the acts on which the suit is based all occurred in another country exceeds the constitutional limits of federal court jurisdiction created by Article III of the United States Constitution.

The vastness of the litigation potential from such universal jurisdiction is beyond calculation. Consider only the millions of victims of governments and factions engaged in armed conflicts in Angola, Lebanon, Israel, the Palestine Authority, Chechnya, Tibet, Rwanda, Liberia, Guatemala, El Salvador, Cambodia, Kashmir, Sri Lanka and all the other countries torn by conflict at the end of this most violent century of mankind. Can U.S. courts be the bully pulpit, or the tort claims forum for all the world's misery if only some defendant can be tagged with one foot on U.S. territory or reached by service overseas? Is the world ready for American tort law?

What would it mean if all countries created such universal extraterritorial jurisdiction? Imagine the opportunities provided by such litigation for harassment and political propaganda against unpopular factions, governments and individuals. Consider the potentials for forum shopping and the impact on tourism and foreign investment from the risks of such litigation.

Can damages assessed in materialistic America involving chance parties, but never immune governments, who know nothing of its values, culture, courts or procedures possibly protect human rights? How can any but the very rich overcome the burden of presenting a defense? No benefit can result from such a vast and interventionist claim of jurisdiction over people and events worldwide, just increased emotional conflict and failed expectations arising from disputes that can only be resolved among the parties, and burdened U.S. courts unable to effectively adjudicate distant clashes of armed forces unreachable by compulsory process.

Who in Rwanda or Bosnia would imagine bringing a lawsuit in the U.S. for loss of family members in factional atrocities committed there when none of the parties live or own property in the United States? Who could afford to bring such an action? How could the cases be meaningfully tried? How would witnesses be compelled to appear, or documents produced? How could the parties ever understand what was happening? Is it not clear that fair trials of such massive cases at so great a distance with no judicial power to compel performance are impossible, that due process cannot be provided?

Only lawyers and organizations interested in the politics of a foreign region, in making a political statement about human rights under law without any reasonable expectation of protecting human rights or recovering damages could bring such suits except under the special circumstances of rich foreign interests, or foreign interests with valuable property here.

What is the meaning and what are the possible consequences of parties, plaintiff and defendant living within miles of each other, perhaps in the same jurisdiction, litigating death cases that occurred there in a foreign forum half a world away? Not even Imperial Rome summoned the rest of the world to seek redress of wrongs in its forum. With no local institutions involved in the proceedings how can judgments be

enforced?

In addition to the other worldliness of such global jurisdiction, its futility must be considered. No court, or lawyer, and only a delusional plaintiff can hope that any damages awarded might be recovered, or an effective injunction might be entered in such a proceeding. There are no parties, or assets in the U.S. There are probably no assets anywhere in most cases against individual defendants living in impoverished and war torn parts of the world. If there are assets, they are almost surely in the forum where the parties live. If the forum there is not functioning for the purpose of entertaining civil actions, can it be expected to execute a foreign judgment on property in its jurisdiction? And an injunction issued by a U.S. court seeking to restrain conduct in other countries of people living there with no possibility of enforcement against people there is too long and thin a tether to support its own credibility.

Such grandiose ex parte extraterritorial jurisdiction cannot be asserted without harmful consequences. It remains true and essential as Chief Justice Marshall wrote that, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. 137, 163 (1803). It is difficult to imagine violations of rights to which this principle ought to apply with greater force than human rights. But the remedy cannot be provided world wide by single nations acting alone. Injury cannot be prevented by private tort actions. Without peace keeping systems involving effective international effort the widespread violence the world is experiencing will grow and private litigation for damages will be a mere aggravant directed by those with means. To play any constructive role private tort litigation will require either international tribunals, or treaties defining jurisdiction over torts committed in other countries. Otherwise human rights litigation will be merely the continuation of war by other means.

The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda processing war crimes cases from former Yugoslavia and Rwanda have requested governments to avoid prosecutions that might interfere with their proceedings and to cooperate with their investigations and provide evidence. These tribunals have some international backing and some prospect for advancing peace through law. Private tort litigation in national courts with potential world wide jurisdiction and no international support, or regulation can only produce more chaos.

Concern for the enormity of potential tort litigation from international human rights violations was recently expressed by a Court of Appeals when considering a claimed exception to the FSIA in a case seeking money damages for injuries and compensation for slave labor while a prisoner in Nazi Germany during World War II:

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of §1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day -- unless disrupted by our courts, that is. Princz v. Federal Republic of Germany, 26 F.3d 1166, n. 1 at 1175 (D.C.Cir. 1994), cert denied, 115 S.Ct. 923, 130 L.Ed.2d 803 (1995).

Princz could not seek jurisdiction under the Alien Tort Act because he is an American citizen. Nor could a U.S. citizen who lived in former Yugoslavia and suffered the very injuries alleged by plaintiffs in these cases sue in U.S. courts for torts in violation of the law of nations under the Alien Tort Statute.

The frequent purpose of suits like this one under the Alien Tort Statute claiming human rights violations will be to make a political statement. An inescapable consequence is to inject U.S. institutional power into foreign disputes on behalf of one side, the side that brings an action. However limited the actual power of the courts, the litigation will be seen as hostile to the faction sued and potentially create enmities toward the U.S. and claims of U.S. judicial imperialism that can impair, or frustrate, the executive branch which cannot control the litigation in its conduct of foreign affairs. Our courts will have very limited power to assure access to facts by court processes and risk one sided submissions and default judgments as has been the pattern so far. That will give the U.S. courts an image of partiality. Justiciability of such cases is an important issue.

The determination of justiciability is the responsibility of the Judicial Branch. This case meets the criteria established in Baker v. Carr, 369 U.S. 186, 217 (1962), which led Judge Robb to conclude that dismissal of the claims in Tel-Oren, supra, was required for nonjusticiability. Both cases involve standards that defy judicial application, Tel-Oren, 726 F.2d at 823-24, questions that touch on sensitive matters of diplomacy and foreign policy that uniquely demand a single voice and policy by the United States government, Tel-Oren at 824-25, and questions connected to conduct of war and achievement of peace of a kind that have historically been within the exclusive domain of the executive and legislative branches. Tel-Oren at 826-27. Here, far more than in Tel-Oren, the possible consequences of judicial action may be injurious to the national interest.

A dismissal for nonjusticiability is without prejudice.

Plaintiffs' claims have been and remain justiciable in former Yugoslavia.

The General Framework Agreement for Peace in Bosnia and Herzegovina prepared during the Proximity Peace talks at Wright-Patterson Air Force base in Dayton, Ohio, November 1-21, 1995, has been ratified by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. See U.N., G.A., 50th Sess., Agenda item 28, A/50/790, S/1995/999, 30 November 1995. It establishes anew that courts where the parties live and the events occurred whether in Croatia, Yugoslavia, or Bosnia and Herzegovina including the Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska are open and available.

The new Constitution of Bosnia and Herzegovina, Annex 4 to the agreement, creates a Constitutional Court of nine members, four elected by the House of Representatives of the Federation, which is equally divided between Bosniacs and Croats, two by the Assembly of Republika Srpska and three selected by the President of the European Court of Human Rights after consultation with the Presidency which consists of one elected Bosniac and one elected Croat from the Federation and one Serb directly elected from Republika Srpska.

The Constitutional Court has appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina which includes both Entities.

Article II of the Constitution is entitled Human Rights and Fundamental Freedoms. Section I, Human Rights, requires the highest level of ensurance of internationally recognized human rights. Section 2 provides the European Convention for the Protection of Human Rights and its Protocols shall apply directly and shall have priority over all other law. Among many relevant provisions of the Convention

and its Protocols is Article 13 of the Convention:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Section 3 enumerates rights of all persons within Bosnia and Herzegovina in a list running from (a) the right to life to, (m) the right to liberty of movement. Paragraph (e) guarantees the right to a fair hearing in civil and criminal matters.

The Constitutional Court also has jurisdiction over issues referred by any court in the territory concerning whether a law is compatible with the Constitution, with the European Convention for Human Rights and its protocols or concerning the existence of or the scope of a general rule of public international law pertinent to a court decision. See ABA Journal, Vol. 82, March 1996 at pp. 52-64 for a group of articles on the Constitutional Court and related law issues in Bosnia and Herzegovina.

U.S and other military leaders assigned to former Yugoslavia during its conflict have warned against "the uninformed notion that this is a war of good versus evil, of aggression against the aggrieved." Making Peace with the Guilty, Foreign Affairs, September/October 1995, pp. 22-39, by General Charles G. Boyd, Deputy Commander in Chief, U.S. European Command from 1992 to July 1995. He writes:

> "All factions in the former Yugoslavia have pursued the same objective -- avoiding minority status in Yugoslavia or any successor state -- and all have used the tools most readily available to achieve that end (p. 24)... I have flown over Bosnian villages and seen the results, not of combat, but of ethnically based criminal violence, homes within a village selectively and systematically

> destroyed as the majority population -- Muslim, Serb or Croat -- cleansed its community of now unwanted minorities (p. 26)... the Serb population in Bosnia may be only about half of its pre-war total (p. 29)."

The hope for peace requires the people involved to face the issues of redress for such wrongs through their own institutions. More than providing the only convenient court, the Constitutional Court alone can serve the greater ends of truth and justice by seeking reconciliation and fairness among the people of Bosnia and Herzegovina through their own people and institutions.

Whether, as all must hope, the Constitution succeeds, it reflects an international diplomatic determination to secure peace and protect human rights in Bosnia and Herzegovina and former Yugoslavia. The territory adopting this Constitution is the best, and in the most basic sense the only place peace and protection of rights can be secured. It should be given the chance to determine rights and justice among its own people. If this Constitution fails, judgments from distant jurisdictions will have little chance for enforcement by a system of law in Bosnia and Herzegovina.

The Agreement for Peace in Bosnia and Herzegovina demonstrates the risks and costs of finding these cases justiciable in the U.S. and strongly supports dismissal here as forum non conveniens.

The summary disposition by the Court of Appeals of the applicability of the doctrine of forum non conveniens stressed by the United States as important in a case with so little contact with the U.S. and urgently requiring consideration reveals an appetite in some courts for such litigation. The Court of Appeals observed no party had identified a more suitable forum, "and we are aware of none." A39. It concluded erroneously and without submissions by the parties that "it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available... even if

circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum." Id.

Courts were open for both criminal and civil proceedings within the areas involved at all times. Since the Dayton Accords in December 1996, jurisdiction within what might now be called former Bosnia has been generally agreed upon as among Croatian and Muslim areas in the Federation of Bosnia and Herzegovina and the new Serb Republika Srpska. Plaintiffs' preference for a United States forum is only the preference of plaintiffs' counsel for a forum where they live and can wield greatest influence in the international political struggle over the failure of former Yugoslavia.

The need for resolution of the scope and application of the Alien Tort Act is urgent. The international community is aware of the expanding jurisdictional reach being claimed by U.S. law and courts, particularly from this very case. Pendency of the cases is a consideration in diplomatic concerns in the region, second to pendency of investigations and indictments by the International Tribunal for the Former Yugoslavia. Both proceedings can affect relations among nations in the region and the United States, as well as internal political decisions throughout former Yugoslavia.

It is important to review these issues now before entering into the bramble bushes of further litigation presented by these cases. Although the judgments below are interlocutory, the issues are fully ripe for review on the basis of the great body of lower court decisions including the careful, detailed and we submit correct analysis of the District Court and the extensive opinion of the Court of Appeals. The parties, courts and the foreign policy interests of the U.S., should not be forced to face the enormous burdens and imponderables of litigation before these clear and important issues are finally and authoritatively resolved.

Interlocutory review is appropriate because this case

presents important and clear-cut issues of law that are fundamental to the further conduct of the case and that otherwise meet the criteria for qualifying as a basis for certiorari. See U.S. v. General Motors Corp., 323 U.S. 373, 377 (1945); Land v. Dollar, 330 U.S. 731, 734 n. 2 (1947); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n. 3 (1949).

Exile and interest groups in the United States supporting governments and factions in areas of armed struggle around the world are seeking litigation opportunities here that address conflicts overseas. The cases opening U.S. courts to such litigation have developed radically new law without Supreme Court guidance for over two decades. The law is at critical stage. This case is the most far reaching statement of this claimed worldwide tort jurisdiction. This case, because of its prominence and relation to important history, cannot escape attention. The need for resolution now is crucial.

III. The Decision Below Violates Established Law And A Treaty Creating Immunity Necessary To Protect Essential Functions Of The United Nations

The common law has long exempted from service of process and personal jurisdiction a non-resident who comes into a jurisdiction to participate as a party or witness in judicial proceedings in order to protect governmental proceedings from undue interference.

Although the exemption has most often been applied to participation in judicial proceedings it has much wider application as described in Durst v. Tautges, Wilder & McDonald, 44 F.2d 507, 509 (7th Cir. 1930). See also, Filer v. McCormick, 260 Fed. 309 (N.D.Calif. 1919)(exemption applied to a non-resident bank president attending an emergency conference to raise money for the U.S. in World War I); Pavlo v. James, 437 F.Supp. 125 (S.D.N.Y. 1977)(attendance at arbitration proceedings); Chase National Bank v. Turner, 269

N.Y. 397 (1936)(client's attendance as observer at an appeal); Youpe v. Strasser, 113 F.Supp 289 (D.D.C. 1953), appeal dismissed sub nom. Youpe v. Moses, 213 F.2d 613 (D.C.Cir. 1954)(the appearance of a witness at a hearing before an administrative official, and a witness before a Committee of Congress).

The U.S. Court of Appeals for the District of Columbia has provided broad immunity from service of process and personal jurisdiction for persons coming to the nation's capital for "government contacts." See, Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C.Cir. 1983), cert. denied, 467 U.S. 1210 (1984). See e.g. Sullivan v. Tagliabue, 785 F.Supp 1076, 1080-81 (D.R.I. 1992) and Nicols v. G.D. Searle & Co., 783 F.Supp. 233, 242-43 (D.Md. 1992), aff'd, 991 F.2d 1195 (4th Cir. 1993), for application of the government contacts exception outside the District of Columbia.

The Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, reprinted at 22 U.S.C. §287 note (1988)(Headquarters Agreement) though entered into in the early years of the U.N. before the scope of immunity required to protect U.N. functions was clear has been held to protect U.N. invitees. See §9(a), 11, 15.

Neither the parties, nor the Court below obtained the views of the United Nations on the immunity question. However, the U.N. Legal Advisor, Carl-August Fleischhauer who is now on the International Court of Justice at the Hague provided a letter for the record in Klinghoffer, dated June 11, 1986, attached to petitioner's rehearing petition below, which considered the immunity of a non-U.N. member, non-recognized government invited to establish a Permanent Observer Mission at the U.N.

Furthermore, since the permanent presence of the Palestine Liberation Organization in New York is a direct result of

> General Assembly resolution 3237 and is restricted to United Nations matters, that presence could appropriately be considered as not covering the receipt of service of legal process both personally and in rem in regard to matters completely unrelated to that presence.

In an important District Court decision which the United States did not appeal despite its denial of relief sought, closure of the PLO Observer Mission to the U.N., by the unanimous Congressional enactment of the Anti Terrorism Act of 1987, 22 U.S.C. §§5201-5203, Judge Palmieri wrote:

> Thus the language, application and interpretation of the Headquarters Agreement lead us to the conclusion that it requires the United States to refrain from interference with the PLO Observer Mission in the discharge of its functions at the United Nations.

U.S. v. PLO, 695 F.Supp 1456 at 1468 (S.D.N.Y. 1988).

The decision of the Court of Appeals in this case is in direct conflict with Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991). The Klinghoffer plaintiffs were U.S. citizens and residents of Manhattan. The Court first observed that except for its U.N. invitation, the defendant would not be entitled to enter the U.S. at all, as is true here. It then held, "and more importantly," that the U.N. could not function without such immunity for its invitees.

Klinghoffer recognized a necessary functional immunity for the Palestine Liberation Organization from personal jurisdiction because of its work as an invitee at the U.N. It held that "basing jurisdiction on the PLO's participation in U.N.-related activities would put an undue burden on the ability of foreign organizations to participate in the U.N.'s affairs." Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 51 (2d Cir. 1991).

The decision below will seriously impair the ability of the U.N. to function at its headquarters in New York. It is particularly harmful because immunity was denied to an essential participant in critical peace negotiations in the very conflict in which plaintiffs' injuries are alleged to have occurred. That participant, your petitioner, was urgently requested to attend the peace negotiations in New York to be available to Security Council members. This Court should recognize that United Nations participants have at least the immunity granted participants in federal, state and local proceedings.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, N.Y.
April 3, 1996

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1541, 1544—August Term 1994

Argued: June 20, 1995 Decided: October 13, 1995

Docket Nos. 94-9035, -9069

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Plaintiffs-Appellants,

—v.—

RADOVAN KARADŽIĆ,

Defendant-Appellee.

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all other similarly situated,

Plaintiffs-Appellants,

—v.—

RADOVAN KARADZIC,

Defendant-Appellee.

Before:

NEWMAN, *Chief Judge*,
FEINBERG and WALKER, *Circuit Judges*.

Appeals from the judgment entered September 19, 1994, in the Southern District of New York (Peter K. Leisure, Judge) dismissing, for lack of subject matter jurisdiction, two lawsuits by victims of atrocities allegedly committed in Bosnia by the Bosnian-Serb leader, Radovan Karadžić. *Doe v. Karadžić*, 866 F. Supp. 734 (S.D.N.Y. 1994).

Judgment reversed and cases remanded.

BETH STEPHENS, New York, N.Y. (Matthew J. Chachère, Jennifer Green, Peter Weiss, Michael Ratner, Jules Lobel, Center for Constitutional Rights, New York, N.Y.; Rhonda Copelon, Celina Romany, International Women's Human Rights Clinic, Flushing, N.Y.; Judith Levin, International League of Human Rights, New York, N.Y.; Harold Hongju Koh, Ronald C. Slye, Swati Agrawal, Bruce Brown,

Charlotte Burrows, Carl Goldfarb, Linda Keller, Jon Levitsky, Daniyal Mueenuddin, Steve Parker, Maxwell S. Peltz, Amy Valley, Wendy Weiser, Allard K. Lowenstein International Human Rights Clinic, New Haven, Conn., on the brief), *for plaintiffs-appellants, Jane Doe I and Jane Doe II.*

CATHARINE A. MACKINNON, Ann Arbor, Mich. (Martha F. Davis, Deborah A. Ellis, Yolanda S. Wu, NOW Legal Defense and Education Fund, New York, N.Y., on the brief), *for plaintiffs-appellants Kadic, Internationalna Iniciativa Zena Bosne I Hercegovine, and Zena Bosne I Hercegovine.*

RAMSEY CLARK, New York, N.Y. (Lawrence W. Schilling, New York, N.Y., on the brief), *for defendant-appellee.*

(Drew S. Days, III, Solicitor General, and Conrad K. Harper, Legal Adviser, Department of State, Washington, D.C., submitted a Statement of Interest of the United States; Frank W. Hunger, Asst. Atty. Gen., and Douglas Letter, Appellate Litigation Counsel, on the brief).

(Karen Honeycut, Vladeck, Waldman, Elias & Engelhard, New York, N.Y., submitted a brief for *amici curiae* Law Professors Frederick M. Abbott, et al.).

(Nancy Kelly, Women Refugee Project, Harvard Immigration and Refugee Program,

Cambridge and Somerville Legal Services, Cambridge, Mass., submitted a brief for *amici curiae* Alliances—an African Women's Network, et al.).

(Juan E. Mendez, Joanne Mariner, Washington, D.C.; Professor Ralph G. Steinhardt, George Washington University School of Law, Washington, D.C.; Paul L. Hoffman, Santa Monica, Cal.; Professor Joan Fitzpatrick, University of Washington School of Law, Seattle, Wash., submitted a brief for *amicus curiae* Human Rights Watch.

(Stephen M. Schneebaum, Washington, D.C., submitted a brief for *amici curiae* The International Human Rights Law Group, et al.).

JON O. NEWMAN, *Chief Judge*:

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. The pending appeals pose

additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action; and whether a person, otherwise liable for a violation of the law of nations, is immune from service of process because he is present in the United States as an invitee of the United Nations.

These issues arise on appeals by two groups of plaintiffs-appellants from the November 19, 1994, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing, for lack of subject matter jurisdiction, their suits against defendant-appellee Radovan Karadžić, President of the self-proclaimed Bosnian-Serb republic of "Srpska." *Doe v. Karadžić*, 866 F. Supp. 734 (S.D.N.Y. 1994) ("*Doe*"). For reasons set forth below, we hold that subject matter jurisdiction exists, that Karadžić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process. We therefore reverse and remand.

Background

The plaintiffs-appellants are Croat and Muslim citizens of the internationally recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia. Their complaints, which we accept as true for purposes of this appeal, allege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture,

and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war. Karadžić, formerly a citizen of Yugoslavia and now a citizen of Bosnia-Herzegovina, is the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina, sometimes referred to as "Srpska," which claims to exercise lawful authority, and does in fact exercise actual control, over large parts of the territory of Bosnia-Herzegovina. In his capacity as President, Karadžić possesses ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadžić and carried out by the military forces under his command. The complaints allege that Karadžić acted in an official capacity either as the titular head of Srpska or in collaboration with the government of the recognized nation of the former Yugoslavia and its dominant constituent republic, Serbia.

The two groups of plaintiffs asserted causes of action for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death. They sought compensatory and punitive damages, attorney's fees, and, in one of the cases, injunctive relief. Plaintiffs grounded subject-matter jurisdiction in the Alien Tort Act, the Torture Victim Protection Act of 1991 ("Torture Victim Act"), Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350 note (Supp. V 1993), the general federal-question jurisdictional statute, 28 U.S.C. § 1331 (1988), and principles of supplemental jurisdiction, 28 U.S.C. § 1367 (Supp. V 1993).

In early 1993, Karadžić was admitted to the United States on three separate occasions as an invitee of the United Nations. According to affidavits submitted by the plaintiffs, Karadžić was personally served with the summons and complaint in each action during two of these visits while he was physically present in Manhattan. Karadžić admits that he received the summons and complaint in the *Kadic* action, but disputes whether the attempt to serve him personally in the *Doe* action was effective.

In the District Court, Karadžić moved for dismissal of both actions on the grounds of insufficient service of process, lack of personal jurisdiction, lack of subject-matter jurisdiction, and nonjusticiability of plaintiffs' claims. However, Karadžić submitted a memorandum of law and supporting papers only on the issues of service of process and personal jurisdiction, while reserving the issues of subject-matter jurisdiction and nonjusticiability for further briefing, if necessary. The plaintiffs submitted papers responding only to the issues raised by the defendant.

Without notice or a hearing, the District Court bypassed the issues briefed by the parties and dismissed both actions for lack of subject-matter jurisdiction. In an Opinion and Order, reported at 866 F. Supp. 734, the District Judge preliminarily noted that the Court might be deprived of jurisdiction if the Executive Branch were to recognize Karadžić as the head of state of a friendly nation, *see Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (head-of-state immunity), and that this possibility could render the plaintiffs' pending claims requests for an advisory opinion. The District Judge recognized that this consideration was not dis-

positive but believed that it "militates against this Court exercising jurisdiction." *Doe*, 866 F. Supp. at 738.

Turning to the issue of subject-matter jurisdiction under the Alien Tort Act, the Court concluded that "acts committed by non-state actors do not violate the law of nations," *id.* at 739. Finding that "[t]he current Bosnian-Serb warring military faction does not constitute a recognized state," *id.* at 741 and that "the members of Karadžić's faction do not act under the color of any recognized state law," *id.*, the Court concluded that "the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied through [the Alien Tort Act]," *id.* at 740-41. The Court did not consider the plaintiffs' alternative claim that Karadžić acted under color of law by acting in concert with the Serbian Republic of the former Yugoslavia, a recognized nation.

The District Judge also found that the apparent absence of state action barred plaintiffs' claim under the Torture Victim Act, which expressly requires that an individual defendant act "under actual or apparent authority, or color of law, of any foreign nation," Torture Victim Act § 2(a). With respect to plaintiffs' further claim that the law of nations, as incorporated into federal common law, gives rise to an implied cause of action over which the Court would have jurisdiction pursuant to section 1331, the Judge found that the law of nations does not give rise to implied rights of action absent specific Congressional authorization, and that, in any event, such an implied right of action would not lie in the absence of state action. Finally, having dismissed all of plaintiffs' federal claims, the Court declined to exercise supplemental jurisdiction over their state-law claims.

Discussion

Though the District Court dismissed for lack of subject matter jurisdiction, the parties have briefed not only that issue but also the threshold issues of personal jurisdiction and justiciability under the political question doctrine. Karadžić urges us to affirm on any one of these three grounds. We consider each in turn.

I. Subject-Matter Jurisdiction

Appellants allege three statutory bases for the subject matter jurisdiction of the District Court—the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

A. The Alien Tort Act

1. General Application to Appellants' Claims

The Alien Tort Act provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 (1988). Our decision in *Filártiga* established that this statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law).[1] *Id.* at 887; *see also Amerada Hess Shipping Corp. v.*

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[1] *Filártiga* did not consider the alternative prong of the Alien Tort Act: suits by aliens for a tort committed in violation of "a treaty of the United States." *See id.* at 880. As in *Filártiga*, plaintiffs in the instant cases "primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather th[a]n independent sources of law," *id.* at 880 n.7.

Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989). The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law.

Because the Alien Tort Act requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible "arising under" formula of section 1331. *See Filártiga*, 630 F.2d at 887-88. Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).

Filártiga established that courts ascertaining the content of the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881; *see also Amerada Hess*, 830 F.2d at 425. We find the norms of contemporary international law by " 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.' " *Filártiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). If this inquiry discloses that the defendant's alleged conduct violates "well-established, universally recognized norms of international law," *id.* at 888, as opposed to "idiosyncratic legal rules," *id.* at 881, then federal jurisdiction exists under the Alien Tort Act.

Karadžić contends that appellants have not alleged violations of the norms of international law because such norms bind only states and persons acting under color of a state's law, not private individuals. In making this contention, Karadžić advances the contradictory positions that he is not a state actor, *see* Brief for Appellee at 19, even as he asserts that he is the President of the self-proclaimed Republic of Srpska, *see* statement of Radovan Karadžić, May 3, 1993, submitted with Defendant's Motion to Dismiss. For their part, the Kadic appellants also take somewhat inconsistent positions in pleading defendant's role as President of Srpska, Kadic Complaint ¶ 13, and also contending that "Karadžić is not an official of any government," Kadic Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 21 n.25.

Judge Leisure accepted Karadžić's contention that "acts committed by non-state actors do not violate the law of nations," *Doe*, 866 F. Supp. at 739, and considered him to be a non-state actor.[2] The Judge appears to

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[2] Two passages of the District Court's opinion arguably indicate that Judge Leisure found the pleading of a violation of the law of nations inadequate because Srpska, even if a state, is not a state "recognized" by other nations. "The current Bosnian-Serb warring military faction does not constitute a recognized state . . . ." *Doe*, 866 F. Supp. at 741; "[t]he Bosnian-Serbs have achieved neither the level of organization nor the recognition that was attained by the PLO [in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)]," *id.* However, the opinion, read as a whole, makes clear that the Judge believed that Srpska is not a state and was not relying on lack of recognition by other states. *See, e.g., id.* at 741 n.12 ("The Second Circuit has limited the definition of 'state' to 'entities that have a defined [territory] and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other entities.' *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir. 1991) (quotation, brackets and citation omitted). The current Bosnian-Serb entity fails to meet this definition." We quote Judge

have deemed state action required primarily on the basis of cases determining the need for state action as to claims of official torture, *see, e.g., Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988), without consideration of the substantial body of law, discussed below, that renders private individuals liable for some international law violations.

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196-97 (1820). In *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844), the Supreme Court observed that pirates were "*hostis humani generis*" (an enemy of all mankind) in part because they acted "without . . . any pretense of public authority." *See generally* 4 William Blackstone, *Commentaries on the Laws of England* 68 (facsimile of 1st ed. 1765-1769, Univ. of Chi., ed. 1979). Later examples are prohibitions against the slave trade and certain war crimes. *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 193 (1992); Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 Harv. Hum. Rts. J. 51 (1992).

The liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations was early

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Leisure's quotation from *Klinghoffer* with the word "territory," which was inadvertently omitted.

recognized by the Executive Branch in an opinion of Attorney General Bradford in reference to acts of American citizens aiding the French fleet to plunder British property off the coast of Sierra Leone in 1795. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law. *See Statement of Interest of the United States* at 5-13.

The Restatement (Third) of the Foreign Relations Law of the United States (1986) ("*Restatement (Third)*") proclaims: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide." *Restatement (Third)* pt. II, introductory note. The Restatement is careful to identify those violations that are actionable when committed by a state, *Restatement (Third)* § 702,[3] and a more limited category of violations of "universal concern," *id.* § 404,[4] partially

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[3] Section 702 provides:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
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> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.

[4] Section 404 provides:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of

overlapping with those listed in section 702. Though the immediate focus of section 404 is to identify those offenses for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders, *cf. id.* § 402(1)(a), (2), the inclusion of piracy and slave trade from an earlier era and aircraft hijacking from the modern era demonstrates that the offenses of "universal concern" include those capable of being committed by non-state actors. Although the jurisdiction authorized by section 404 is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, *id.* § 404 cmt. b, such as the tort actions authorized by the Alien Tort Act. Indeed, the two cases invoking the Alien Tort Act prior to *Filártiga* both applied the civil remedy to private action. *See Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).

Karadžić disputes the application of the law of nations to any violations committed by private individuals, relying on *Filártiga* and the concurring opinion of Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).[5] *Filártiga* involved an allegation of torture committed by a state official. Relying on the United Nations' Declaration on the Protection of All Persons from Being

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aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.

[5] Judge Edwards was the only member of the *Tel-Oren* panel to confront the issue whether the law of nations applies to non-state actors. Then-Judge Bork, relying on separation of powers principles, concluded, in disagreement with *Filártiga*, that the Alien Tort Act did not apply to most violations of the law of nations. *Tel-Oren*, 726 F.2d at 798. Judge Robb concluded that the controversy was non-justiciable. *Id.* at 823.

Subjected to Torture, G.A. Res. 3452, U.N. GAOR, U.N. Doc. A/1034 (1975) (hereinafter "Declaration on Torture"), as a definitive statement of norms of customary international law prohibiting states from permitting torture, we ruled that "*official* torture is now prohibited by the law of nations." *Filártiga*, 630 F.2d at 884 (emphasis added). We had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in *Filártiga* purports to preclude such a result.

Nor did Judge Edwards in his scholarly opinion in *Tel-Oren* reject the application of international law to any private action. On the contrary, citing piracy and slave-trading as early examples, he observed that there exists a "handful of crimes to which the law of nations attributes individual responsibility," *id.* at 795. Reviewing authorities similar to those consulted in *Filártiga*, he merely concluded that torture—the specific violation alleged in *Tel-Oren*—was not within the limited category of violations that do not require state action.

Karadžić also contends that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act. We disagree. Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filártiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (explaining that codification of *Filártiga* was necessary in light of skepticism expressed by Judge Bork's concurring opinion in *Tel-Oren*). At the same time, Congress indicated that the Alien Tort Act "has other important uses and should not be replaced," because

> claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

Id. The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.

2. Specific Application of Alien Tort Act to Appellants' Claims

In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant." *Amerada Hess*, 830 F.2d at 425. In making that inquiry, it will be helpful to group the appellants' claims into three categories: (a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.

(a) *Genocide*. In the aftermath of the atrocities committed during the Second World War, the condemnation of genocide as contrary to international law quickly achieved broad acceptance by the community of nations. In 1946, the General Assembly of the United Nations declared that genocide is a crime under international law that is condemned by the civilized world, whether the perpetrators are "private individuals, public officials or statesmen." G.A. Res. 96(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188-89 (1946). The General Assembly

also affirmed the principles of Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal for punishing " 'persecutions on political, racial, or religious grounds,' " regardless of whether the offenders acted " 'as individuals or as members of organizations,' " *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 555 n.11 (N.D. Ohio) (quoting Article 6). *See* G.A. Res. 95(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188 (1946).

The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, *for the United States* Feb. 23, 1989 (hereinafter "Convention on Genocide"), provides a more specific articulation of the prohibition of genocide in international law. The Convention, which has been ratified by more than 120 nations, including the United States, *see* U.S. Dept. of State, *Treaties in Force* 345 (1994), defines "genocide" to mean

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births with the group;
>
> (e) Forcibly transferring children of the group to another group.

Convention on Genocide art. II. Especially pertinent to the pending appeal, the Convention makes clear that "[p]ersons committing genocide . . . shall be punished, *whether they are constitutionally responsible rulers, public officials or private individuals.*" *Id.* art. IV (emphasis added). These authorities unambiguously reflect that, from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors.

The applicability of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988), which criminalizes acts of genocide without regard to whether the offender is acting under color of law, *see id.* § 1091(a) ("[w]hoever" commits genocide shall be punished), if the crime is committed within the United States or by a U.S. national, *id.* § 1091(d). Though Congress provided that the Genocide Convention Implementation Act shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding," *id.* § 1092, the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the Alien Tort Act. Nothing in the Genocide Convention Implementation Act or its legislative history reveals an intent by Congress to repeal the Alien Tort Act insofar as it applies to genocide,[6] and the two

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[6] The Senate Report merely repeats the language of section 1092 and does not provide any explanation of its purpose. *See* S. Rep. 333, 100th Cong., 2d Sess., at 5 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4156, 4160. The House Report explains that section 1092 "clarifies that the bill creates no *new* federal cause of action in civil proceedings." H.R. Rep. 566, 100th Cong., 2d Sess., at 8 (1988) (emphasis added). This explanation confirms our view that the Genocide Convention Implementation

statutes are surely not repugnant to each other. Under these circumstances, it would be improper to construe the Genocide Convention Implementation Act as repealing the Alien Tort Act by implication. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest.") (citations and internal quotation marks omitted); *United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir.) ("mutual exclusivity" of statutes is required to demonstrate Congress's "clear, affirmative intent to repeal"), *cert. denied*, 500 U.S. 941 (1991).

Appellants' allegations that Karadžić personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadžić acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.

(b) *War crimes*. Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. *See In re Yamashita*, 327 U.S. 1, 14 (1946). Moreover, international law imposes an affirmative duty on military commanders to take appropriate

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Act was not intended to abrogate civil causes of action that might be available under *existing* laws, such as the Alien Tort Act.

measures within their power to control troops under their command for the prevention of such atrocities. *Id.* at 15-16.

After the Second World War, the law of war was codified in the four Geneva Conventions,[7] which have been ratified by more than 180 nations, including the United States, *see Treaties in Force*, *supra*, 398-99. Common article 3, which is substantially identical in each of the four Conventions, applies to "armed conflict[s] not of an international character" and binds "each Party to the conflict . . . to apply, as a minimum, the following provisions":

> Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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[7] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 (hereinafter "Geneva Convention I"); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.T.S. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court . . . .

Geneva Convention I art. 3(1). Thus, under the law of war as codified in the Geneva Conventions, all "parties" to a conflict—which includes insurgent military groups—are obliged to adhere to these most fundamental requirements of the law of war.[8]

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[8] Appellants also maintain that the forces under Karadžić's command are bound by the Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977) ("Protocol II"), which has been signed but not ratified by the United States, *see* International Committee of the Red Cross: *Status of Four Geneva Conventions and Additional Protocols I and II*, 30 I.L.M. 397 (1991). Protocol II supplements the fundamental requirements of common article 3 for armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *Id.* art. 1. In addition, plaintiffs argue that the forces under Karadžić's command are bound by the remaining provisions of the Geneva Conventions, which govern international conflicts, *see* Geneva Convention I art. 2, because the self-proclaimed Bosnian-Serb republic is a nation that is at war with Bosnia-Herzegovina or, alternatively, the Bosnian-Serbs are an insurgent group in a civil war who have attained the status of "belligerents," and to whom the rules governing international wars therefore apply.

At this stage in the proceedings, however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into

The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, *see* Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 Int'l Conciliation 304 (April 1949) (collecting cases), and remains today an important aspect of international law, *see* Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, in 4 The Vietnam War and International Law 447 (R. Falk ed. 1976). The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law.

(c) *Torture and summary execution.* In *Filártiga*, we held that *official* torture is prohibited by universally accepted norms of international law, *see* 630 F.2d at 885, and the Torture Victim Act confirms this holding and extends it to cover summary execution. Torture Victim Act §§ 2(a), 3(a). However, torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law. *See* Declaration on Torture art. 1 (defining torture as being "inflicted by or at the instigation of a public official"); Convention Against Torture and Other Cruel,

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universally accepted norms of international law, or whether the provisions of the Geneva Conventions applicable to international conflicts apply to the Bosnian-Serb forces on either theory advanced by plaintiffs.

Inhuman, or Degrading Treatment or Punishment pt. I, art. 1, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985), *entered into force* June 26, 1987, *ratified by United States* Oct. 21, 1994, 34 I.L.M. 590, 591 (1995) (defining torture as "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); Torture Victim Act § 2(a) (imposing liability on individuals acting "under actual or apparent authority, or color of law, of any foreign nation").

In the present case, appellants allege that acts of rape, torture, and summary execution were committed during hostilities by troops under Karadžić's command and with the specific intent of destroying appellants' ethnic-religious groups. Thus, many of the alleged atrocities are already encompassed within the appellants' claims of genocide and war crimes. Of course, at this threshold stage in the proceedings it cannot be known whether appellants will be able to prove the specific intent that is an element of genocide, or prove that each of the alleged torts were committed in the course of an armed conflict, as required to establish war crimes. It suffices to hold at this stage that the alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes, and otherwise may be pursued against Karadžić to the extent that he is shown to be a state actor. Since the meaning of the state action requirement for purposes of international law violations will likely arise on remand and has already been considered by the District Court, we turn next to that requirement.

3. The State Action Requirement for International Law Violations

In dismissing plaintiffs' complaints for lack of subject-matter jurisdiction, the District Court concluded that the alleged violations required state action and that the "Bosnian-Serb entity" headed by Karadžić does not meet the definition of a state. *Doe*, 866 F. Supp. at 741 n.12. Appellants contend that they are entitled to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadžić acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.

(a) *Definition of a state in international law.* The definition of a state is well established in international law:

> Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

Restatement (Third) § 201; *accord Klinghoffer*, 937 F.2d at 47; *National Petrochemical*, 860 F.2d at 553; *see also Texas v. White*, 74 U.S. (7 Wall.) 700, 720 (1868). "[A]ny government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation." *Ford v. Surget*, 97 U.S. (7 Otto) 594, 620 (1878) (Clifford, J., concurring).

Although the Restatement's definition of statehood requires the *capacity* to engage in formal relations with

other states, it does not require recognition by other states. *See Restatement (Third)* § 202 cmt. b ("An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states.' Recognized states enjoy certain privileges and immunities relevant to judicial proceedings, *see, e.g., Pfizer Inc. v. India*, 434 U.S. 308, 318-20 (1978) (diversity jurisdiction); *Sabbatino*, 376 U.S. at 408-12 (access to U.S. courts); *Lafontant*, 844 F. Supp. at 131 (head-of-state immunity), but an unrecognized state is not a juridical nullity. Our courts have regularly given effect to the "state" action of unrecognized states. *See, e.g., United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-03 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9-12 (1869) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971) (post-World War II East Germany).

The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. *See Restatement (Third)* §§ 207, 702. It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

Appellants' allegations entitle them to prove that Karadžić's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have

entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

(b) *Acting in concert with a foreign state.* Appellants also sufficiently alleged that Karadžić acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987), *reconsideration granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). The appellants are entitled to prove their allegations that Karadžić acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.

B. The Torture Victim Protection Act

The Torture Victim Act, enacted in 1992, provides a cause of action for official torture and extrajudicial killing:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Act § 2(a). The statute also requires that a plaintiff exhaust adequate and available local remedies, *id.* § 2(b), imposes a ten-year statute of limitations, *id.* § 2(c), and defines the terms "extrajudicial killing" and "torture," *id.* § 3.

By its plain language, the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Legislative history confirms that this language was intended to "make[ ] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim," and that the statute "does not attempt to deal with torture or killing by purely private groups." H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. In construing the terms "actual or apparent authority" and "color of law," courts are instructed to look to principles of agency law and to jurisprudence under 28 U.S.C. § 1983, respectively. *Id.*

Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien

Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of section 1331, *see Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995), to which we now turn.

C. Section 1331

The appellants contend that section 1331 provides an independent basis for subject-matter jurisdiction over all claims alleging violations of international law. Relying on the settled proposition that federal common law incorporates international law, *see The Paquete Habana*, 175 U.S. 677, 700 (1900); *In re Estate of Ferdinand E. Marcos Human Rights Litigation* (*Marcos I*), 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993); *Filártiga*, 630 F.2d at 886, they reason that causes of action for violations of international law "arise under" the laws of the United States for purposes of jurisdiction under section 1331. Whether that is so is an issue of some uncertainty that need not be decided in this case.

In *Tel-Oren* Judge Edwards expressed the view that section 1331 did not supply jurisdiction for claimed violations of international law unless the plaintiffs could point to a remedy granted by the law of nations or argue successfully that such a remedy is implied. *Tel-Oren*, 726 F.2d at 779-80 n.4. The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations. *Id.* at 778 (Edwards, J., concurring). Some district courts, however, have upheld section 1331 juris-

diction for international law violations. *See Abebe-Jiri v. Negewo*, No. 90-2010 (N.D. Ga. Aug. 20, 1993), *appeal argued*, No. 93-9133 (11th Cir. Jan. 10, 1995); *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slip op. at 4-5 (N.D. Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

We recognized the possibility of section 1331 jurisdiction in *Filártiga*, 630 F.2d at 887 n.22, but rested jurisdiction solely on the applicable Alien Tort Act. Since that Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture, and the Torture Victim Act also appears to provide a remedy for their allegations of official torture, their causes of action are statutorily authorized, and, as in *Filártiga*, we need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction.

II. Service of Process and Personal Jurisdiction

Appellants aver that Karadžić was personally served with process while he was physically present in the Southern District of New York. In the *Doe* action, the affidavits detail that on February 11, 1993, process servers approached Karadžić in the lobby of the Hotel Intercontinental at 111 East 48th St. in Manhattan, called his name and identified their purpose, and attempted to hand him the complaint from a distance of two feet, that security guards seized the complaint papers, and that the papers fell to the floor. Karadžić submitted an affidavit of a State Department security officer, who generally confirmed the episode, but stated that the process server did not come closer than six feet of the defendant. In the

Kadic action, the plaintiffs obtained from Judge Owen an order for alternate means of service, directing service by delivering the complaint to a member of defendant's State Department security detail, who was ordered to hand the complaint to the defendant. The security officer's affidavit states that he received the complaint and handed it to Karadžić outside the Russian Embassy in Manhattan. Karadžić's statement confirms that this occurred during his second visit to the United States, sometime between February 27 and March 8, 1993. Appellants also allege that during his visits to New York City, Karadžić stayed at hotels outside the "headquarters district" of the United Nations and engaged in non-United Nations-related activities such as fund-raising.

Fed. R. Civ. P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction. *See Burnham v. Superior Court*, 495 U.S. 604 (1990).

Nevertheless, Karadžić maintains that his status as an invitee of the United Nations during his visits to the United States rendered him immune from service of process. He relies on both the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted at* 22 U.S.C. § 287 note (1988) ("Headquarters Agreement"), and a claimed federal common law immunity. We reject both bases for immunity from service.

A. Headquarters Agreement

The Headquarters Agreement provides for immunity from suit only in narrowly defined circumstances. First, "service of legal process . . . may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General." *Id.* § 9(a). This provision is of no benefit to Karadžić, because he was not served within the well-defined confines of the "headquarters district," which is bounded by Franklin D. Roosevelt Drive, 1st Avenue, 42nd Street, and 48th Street, *see id.* annex 1. Second, certain representatives of members of the United Nations, whether residing inside or outside of the "headquarters district," shall be entitled to the same privileges and immunities as the United States extends to accredited diplomatic envoys. *Id.* § 15. This provision is also of no benefit to Karadžić, since he is not a designated representative of any member of the United Nations.

A third provision of the Headquarters Agreement prohibits federal, state, and local authorities of the United States from "impos[ing] any impediments to transit to or from the headquarters district of . . . persons invited to the headquarters district by the United Nations . . . on official business." *Id.* § 11. Karadžić maintains that allowing service of process upon a United Nations invitee who is on official business would violate this section, presumably because it would impose a potential burden—exposure to suit—on the invitee's transit to and from the headquarters district. However, this Court has previously refused "to extend the immunities provided by the Headquarters Agreement beyond those explicitly stated." *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir. 1991). We therefore reject Karadžić's proposed construction of section 11, because

it would effectively create an immunity from suit for United Nations invitees where none is provided by the express terms of the Headquarters Agreement.[9]

The parties to the Headquarters Agreement agree with our construction of it. In response to a letter from plaintiffs' attorneys opposing any grant of immunity to Karadžić, a responsible State Department official wrote: "Mr. Karadžić's status during his recent visits to the United States has been solely as an 'invitee' of the United Nations, and as such he enjoys no immunity from the jurisdiction of the courts of the United States." Letter from Michael J. Habib, Director of Eastern European Affairs, U.S. Dept. of State, to Beth Stephens (Mar. 24, 1993) ("Habib Letter"). Counsel for the United Nations has also issued an opinion stating that although the United States must allow United Nations invitees access to the Headquarters District, invitees are not immune from legal process while in the United State at locations outside of the Headquarters District. *See In re Galvao*, [1963] U.N. Jur. Y.B. 164 (opinion of U.N. legal counsel); *see also Restatement (Third)* § 469 reporter's note 8 (U.N. invitee "is not immune from suit or legal process outside the headquarters district during his sojourn in the United States").

B. Federal common law immunity

Karadžić nonetheless invites us to fashion a federal common law immunity for those within a judicial district as a United Nations invitee. He contends that such a rule

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[9] Conceivably, a narrow immunity from service of process might exist under section 11 for invitees who are in *direct* transit between an airport (or other point of entry into the United States) and the Headquarters District. Even if such a narrow immunity did exist—which we do not decide—Karadžić would not benefit from it since he was not served while traveling to or from the Headquarters District.

is necessary to prevent private litigants from inhibiting the United Nations in its ability to consult with invited visitors. Karadžić analogizes his proposed rule to the "government contacts exception" to the District of Columbia's long-arm statute, which has been broadly characterized to mean that "mere entry [into the District of Columbia] by non-residents for the purpose of contacting federal government agencies cannot serve as a basis for in personam jurisdiction," *Rose v. Silver*, 394 A.2d 1368, 1370 (D.C. 1978); *see also Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 785-87 (D.C. Cir. 1983) (construing government contacts exception to District of Columbia's long-arm statute), *cert. denied*, 467 U.S. 1210 (1984). He also points to a similar restriction upon assertion of personal jurisdiction on the basis of the presence of an individual who has entered a jurisdiction in order to attend court or otherwise engage in litigation. *See generally* 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1076 (2d ed. 1987).

Karadžić also endeavors to find support for a common law immunity in our decision in *Klinghoffer*. Though, as noted above, *Klinghoffer* declined to extend the immunities of the Headquarters Agreement beyond those provided by its express provisions, the decision applied immunity considerations to its construction of New York's long-arm statute, N.Y. Civ. Prac. L. & R. 301 (McKinney 1990), in deciding whether the Palestine Liberation Organization (PLO) was doing business in the state. *Klinghoffer* construed the concept of "doing business" to cover only those activities of the PLO that were not United Nations-related. *See* 937 F.2d at 51.

Despite the considerations that guided *Klinghoffer* in its narrowing construction of the general terminology of

New York's long-arm statute as applied to United Nations activities, we decline the invitation to create a federal common law immunity as an extension of the precise terms of a carefully crafted treaty that struck the balance between the interests of the United Nations and those of the United States.

Finally, we note that the mere possibility that Karadžić might at some future date be recognized by the United States as the head of state of a friendly nation and might thereby acquire head-of-state immunity does not transform the appellants' claims into a nonjusticiable request for an advisory opinion, as the District Court intimated. Even if such future recognition, determined by the Executive Branch, *see Lafontant*, 844 F. Supp. at 133, would create head-of-state immunity, *but see In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (passage of Foreign Sovereign Immunities Act leaves scope of head-of-state immunity uncertain), it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch *might* do in the future. *See Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy . . ., not to enlarge an immunity to an extent which the government . . . has not seen fit to recognize.").

In sum, if appellants personally served Karadžić with the summons and complaint while he was in New York but outside of the U.N. headquarters district, as they are prepared to prove, he is subject to the personal jurisdiction of the District Court.

III. Justiciability

We recognize that cases of this nature might pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations. We do not read *Filártiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations. To the contrary, we recognize that suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches. *See First National Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972). We therefore proceed to consider whether, even though the jurisdictional threshold is satisfied in the pending cases, other considerations relevant to justiciability weigh against permitting the suits to proceed.

Two nonjurisdictional, prudential doctrines reflect the judiciary's concerns regarding separation of powers: the political question doctrine and the act of state doctrine. It is the " 'constitutional' underpinnings" of these doctrines that influenced the concurring opinions of Judge Robb and Judge Bork in *Tel-Oren*. Although we too recognize the potentially detrimental effects of judicial action in cases of this nature, we do not embrace the rather categorical views as to the inappropriateness of judicial action urged by Judges Robb and Bork. Not every case "touching foreign relations" is non-justiciable, *see Baker v. Carr*, 369 U.S. 186, 211 (1962); *Lamont v. Woods*, 948 F.2d 825, 831-32 (2d Cir. 1991), and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considera-

tions on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.

Karadžić maintains that these suits were properly dismissed because they present nonjusticiable political questions. We disagree. Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions. "[T]he doctrine 'is one of "political questions," not one of "political cases." ' " *Klinghoffer*, 937 F.2d at 49 (quoting *Baker*, 369 U.S. at 217).

A nonjusticiable political question would ordinarily involve one or more of the following factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217; *see also Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994). With respect to the first three factors, we have noted in a similar context

involving a tort suit against the PLO that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Klinghoffer*, 937 F.2d at 49. Although the present actions are not based on the common law of torts, as was *Klinghoffer*, our decision in *Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim such suits relate to matters that are constitutionally committed to another branch. *See Nixon v. United States*, 113 S. Ct. 732, 735 (1993).

The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests. Disputes implicating foreign policy concerns have the potential to raise political question issues, although, as the Supreme Court has wisely cautioned, "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986) (quoting *Baker*, 369 U.S. at 211).

The act of state doctrine, under which courts generally refrain from judging the acts of a foreign state within its territory, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428; *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), might be implicated in some cases arising

under section 1350. However, as in *Filártiga*, 630 F.2d at 889, we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state.

In the pending appeal, we need have no concern that interference with important governmental interests warrants rejection of appellants' claims. After commencing their action against Karadžić, attorneys for the plaintiffs in *Doe* wrote to the Secretary of State to oppose reported attempts by Karadžić to be granted immunity from suit in the United States; a copy of plaintiffs' complaint was attached to the letter. Far from intervening in the case to urge rejection of the suit on the ground that it presented political questions, the Department responded with a letter indicating that Karadžić was not immune from suit as an invitee of the United Nations. *See* Habib Letter, *supra*.[10] After oral argument in the pending appeals, this Court wrote to the Attorney General to inquire whether the United States wished to offer any further views concerning any of the issues raised. In a "Statement of Interest," signed by the Solicitor General and the State Department's Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act

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10 The Habib letter on behalf of the State Department added:

> We share your repulsion at the sexual assaults and other war crimes that have been reported as part of the policy of ethnic cleansing in Bosnia-Herzegovina. The United States has reported rape and other grave breaches of the Geneva Conventions to the United Nations. This information is being investigated by a United Nations Commission of Experts, which was established at U.S. initiative.

that might raise a political question, this is not one of them." Statement of Interest of the United States at 3. Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government's reply to our inquiry reenforces our view that adjudication may properly proceed.

As to the act of state doctrine, the doctrine was not asserted in the District Court and is not before us on this appeal. *See Filártiga*, 630 F.2d at 889. Moreover, the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state. Finally, as noted, we think it would be a rare case in which the act of state doctrine precluded suit under section 1350. *Banco Nacional* was careful to recognize the doctrine "in the absence of . . . unambiguous agreement regarding controlling legal principles," 376 U.S. at 428, such as exist in the pending litigation, and applied the doctrine only in a context—expropriation of an alien's property—in which world opinion was sharply divided, *see id.* at 428-30.

Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum.

Conclusion

The judgment of the District Court dismissing appellants' complaints for lack of subject-matter jurisdiction is reversed, and the cases are remanded for further proceedings in accordance with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1541, 1544—August Term, 1994

Petition for Rehearing Decided: January 6, 1996
Submitted: November 15, 1995

Docket Nos. 94-9035, -9069

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Plaintiffs-Appellants,

—v.—

RADOVAN KARADŽIĆ,

Defendant-Appellee.

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all other similarly situated,

Plaintiffs-Appellants,

—v.—

RADOVAN KARADŽIĆ,

Defendant-Appellee.

Before:

NEWMAN, *Chief Judge*,
FEINBERG and WALKER, *Circuit Judges*.

Petition for rehearing by defendant-appellee of the October 13, 1995, decision, ___ F.3d ___, reversing and remanding cases to the District Court. Petition denied.

JON O. NEWMAN, *Chief Judge*:

The defendant-appellee's petition for rehearing calls our attention to an interesting law review article not previously cited to us. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995). Professor Sweeney's article endeavors to explore the proper interpretation of the phrase "tort only" in the Alien Tort Act. It concludes that the statute, as enacted in 1789 by the 1st Congress, was intended to authorize federal court jurisdiction for only one limited category of torts—torts committed in violation of the law of nations by the crews of vessels in the course of stopping and boarding ships believed to be aiding the enemy in time of war. Such torts, Professor Sweeney maintains, were litigated before 1789 in state courts exercising admiralty jurisdiction, including "prize jurisdiction," the authority to adjudicate whether a cap-

tor has lawfully seized a ship and its cargo as a prize. After Article III of the Constitution extended the judicial power of the United States to admiralty cases, U.S. Const. art. III, § 2, Congress enacted the provisions of the First Judiciary Act that are now 28 U.S.C. § 1333 (1988) to make that jurisdiction exclusive (except for "saving to suitors" cases in which plaintiff may bring certain maritime claims in state court). But, Professor Sweeney continues, Congress adopted the language that is now 28 U.S.C. § 1350 (1988) to make clear that the jurisdiction of the new federal courts to remedy torts committed against aliens in violation of the internationally recognized law of prize would be exercised by the federal courts concurrently with the state courts. In his view, the language that is now section 1350 extended only to this one category of torts.

Professor Sweeney's argument is interesting, but far from conclusive. Notably absent is any contemporaneous indication from the likely draftsman of the key language, Oliver Ellsworth, or from any other member of the 1st Congress, that their broad statutory language "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" was intended to apply to only one category of torts. Even if the tort of wrongfully boarding in time of war a ship suspected of aiding the enemy was the tort that prompted the 1st Congress to create federal court jurisdiction for aliens suffering damages in violation of the law of nations or a treaty of the United States, it does not follow that the statute should be confined to this tort. Statutes enacted with one object in the legislative mind are frequently drafted in broad terms that are properly applied to situations within both the literal terms and the spirit of the statute, though not within the immediate

contemplation of the drafters. *See, e.g.*, 42 U.S.C. § 1985(3) (1988) (part of so-called "Ku Klux Klan Act" of 1871, creating damage remedy for injury by those who "conspire, or go in disguise on the highway" for purpose of denying "equal protection of the laws"); *see also Keating v. Carey*, 706 F.2d 377, 386-88 (2d Cir. 1983).

In any event, however we might have construed the Alien Tort Act in a case arising in 1789, two circumstances guide our interpretation two hundred years later. First, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), has established as the law of this Circuit that the Alien Tort Act has a broad scope and that courts ascertaining the content of the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881. We have neither the authority nor the inclination to retreat from that ruling. Second, Congress has made clear that its enactment of the Torture Victim Protection Act of 1991 was intended to codify the cause of action recognized by this Circuit in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86. With a broad reading of the Alien Tort Act settled as the law of this Circuit and codified by Congress as recently as 1991, we decline the invitation to limit the Act to the one category of torts that arguably prompted its enactment.

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE I,
on behalf of herself and all
others similarly situated,

-and-

JANE DOE II,
on behalf of herself and as
administratrix of the estate of
her deceased mother, and on
behalf of all others similarly
situated,

Plaintiffs,

- against -

RADOVAN KARADZIC,

Defendant.

OPINION AND ORDER

93 Civ. 0878 (PKL)

S. KADIC,
on her own behalf and on
behalf of her infant sons
BENJAMIN and OGNJEN,
INTERNATIONALA INICIATIVEZENA
BOSNE I HERCEGOVINE "BISTER,"
and ZENE BOSNE I HERCEGOVINE,

Plaintiffs,

- against -

RADOVAN KARADZIC,

Defendant.

93 Civ. 1163(PKL)

LEISURE, District Judge:

These two related actions, Doe et al. v. Karadzic, 93 Civ. 0878 (PKL) and Kadic et al. v. Karadzic, 93 Civ. 1163 (PKL), have been brought before this Court pursuant to: the Alien Tort Act, 28 U.S.C. §1350 (1948); the Torture Victim Protection Act, Pub.L. No. 102-256, 106 Stat. 73 (1992) also codified at 28 U.S.C. §1350; federal question jurisdiction, 28 U.S.C. §1331; and the principles of supplemental jurisdiction, 28 U.S.C. §1367.

Jane Doe I and Jane Doe II, on behalf of themselves and the members of their respective classes (collectively the "Doe Plaintiffs"), seek compensatory and punitive damages for acts of rape and other human rights violations committed by forces under the command and control of defendant Radovan Karadzic. Complaint Jane Doe I and Jane Doe II v. Radovan Karadzic, 93 Civ. 0878 (PKL), filed February 11, 1993, ("Doe Complaint") at ¶¶1, 6. Defendant Karadzic is the leader of the Bosnian-Serb military faction, which is fighting against the government of Bosnia-Herzegovina, id. at 6, and is also the self-proclaimed president of the unrecognized Bosnian-Serb entity. Doe Memorandum in Opposition to Defendant's Motion to Dismiss (Doe Mem.:) at 4; Doe Complaint at ¶15.

Plaintiffs in the related action, Kadic et al. v. Karadzic ("Kadic Plaintiffs"), seek injunctive relief and compensatory and punitive damages for personal injuries suffered as a result of inter alia, genocidal acts, torture, extrajudicial killing, and other violations of the law of nations. Complaint S.K. et al. v. Radovan Karadzic, 93 Civ 1163 (PKL), filed March 2, 1993, ("K. Complaint") at ¶1. Doe Plaintiffs and K. Plaintiffs (collectively the "plaintiffs") claim that they and others similarly situated are the victims of a genocidal campaign designed, authorized and directed by Karadzic.

Defendant Karadzic now moves pursuant to Fed.R.Civ.P. 12(b)(1), (21), (4), (5), and (6), for an order dismissing plaintiffs' actions on the following grounds: lack of subject matter jurisdiction, lack of personal jurisdiction,

insufficiency of service of process, and nonjusticiability. For the reasons set forth below, defendant's motion to dismiss for lack of subject matter jurisdiction is granted and the actions are hereby dismissed.[1]

BACKGROUND

On February 29, 1992, the Croats and Muslims of Bosnia-Herzegovina declared independence from Yugoslavia by popular referendum. Serbs living within Bosnia-Herzegovina boycotted the referendum and declared their own independence from the new nation, claiming a part of its

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[1] In a Memorandum Order, dated September 23, 1994, this Court granted defendant an additional week in which to submit his reply papers. In that Order, defendant was admonished not to raise issues for the first time in his reply, and that such issues would be treated as a nullity. In his reply, Defendant submitted the affidavit of Agent Deibler ("Deibler Affidavit"). In turn, Doe Plaintiffs sought leave to file a sur-reply in order to address arguments contained in defendant's reply papers, specifically those contained in Deibler's Affidavit. Deibler's Affidavit primarily addresses the adequacy of service on defendant, an issue that was previously raised in defendant's motion, yet the affidavit presents additional facts. Furthermore, Deibler's affidavit raises for the first time the issue of fund raising. In order to allow this Court more fully to address the issues raised in the instant motion, this Court herein, grants Doe Plaintiffs leave to file the aforementioned sur-reply, previously submitted to the Court. Accordingly, in addressing the arguments raised by the instant motion, the Court has considered defendant's reply papers in their entirety, as well as the papers submitted by plaintiffs in their sur-reply, including the State Department command post logs submitted to the Court on October 26, 1993.

territory for their own.[2] This Bosnian-Serb entity has not been formally recognized internationally, nor has it been recognized by the United Nations. Doe Mem. at 4, n. 3; Doe Complaint at ¶15.[3] The conflict between the Serbs and Muslims of Bosnia-Herzegovina escalated towards a state of civil war between the several ethnic factions within Bosnia-Herzegovina. The instant related actions arise out of acts allegedly engaged in by members of the forces under the command of defendant, and conducted in furtherance of defendant's attempt to gain power and control in Bosnia-Herzegovina. Doe Mem. at 4-5; Kadic Memorandum Submitted in Opposition to Defendant's Motion ("K. Mem.") at 2.

On February 11, 1993, Doe Plaintiffs filed their class action complaint, seeking redress on behalf of all women and men who were victims of the following torts inflicted by Bosnian-Serb military forces under the command of defendant: genocide, war crimes,[4] summary execution, wrongful death, torture, cruel, inhuman or degrading treatment, assault and battery, rape and intentional infliction of emotional harm. The class includes many thousands of people who have been subject to human rights abuses. Doe Complaint at ¶¶10-11. Doe plaintiffs alleged that Bosnian-Serb forces have systematically

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[2] See Chuck Sudetic, Turnout in Bosnia Signals Independence, N.Y. Times, March 2, 1992, at A3. See also, Chronology of Bosnia War, N.Y. Times, February 6, 1994, at Section 1, page 12; Doe Mem. at 3 (presenting a somewhat different chronology of events).

[3] See Chuck Sudetic, Belgrade Issues Warning to Bosnian Serbs, N.Y. Times, August 3, 1994, at A10. (stating that "[t]he Srpska Republic is the government proclaimed by the Bosnian Serb rebels")

[4] Doe's claim for "war crimes and crimes against humanity" shall be referred to hereafter as "war crimes."

employed brutal violence against Bosnian Muslims. These abuses are collectively referred to as "ethnic cleansing." Id. at ¶17.

Kadic Plaintiffs also allege that defendant Karadzic designed, ordered, implemented, and directed a campaign of "ethnic cleansing." K. Complaint at ¶14. K. Plaintiffs allege that this campaign included, inter alia, massacres, selective murders, pillage, forced detention, and forced evacuations. Specifically, K. herself alleges that she witnessed the murder of her son, the burning of her home, and that she was repeatedly raped. K. Plaintiffs allege that these and other acts were conducted pursuant to the order and direction of defendant Karadzic, and that such acts continue to the present.

On February 11, 1993, the same day the Doe Complaint was filed, Jonathan Soroko ("Soroko") attempted to effect service on Karadzic in the lobby of Karadzic's hotel, the Hotel Inter-Continental, 111 East 48th Street, New York, New York. Affidavit of Jonathan Soroko, submitted in support of Doe Mem., sworn to on February 12, 1993 ("Soroko Aff."), at ¶4. At the time, Karadzic was surrounded by a security detachment led by Special Agent R.A. Diebler ("Diebler"), a Special Agents of the Diplomatic Security Service of the United States Department of State. When Soroko attempted to serve Karadzic, Diebler's security team executed a procedure designed to cover and evacuate Karadzic, forming a ring around Karadzic and rushing him into the elevator. Affidavit of Agent Roy Anthony Diebler, sworn to on September 30, 1993, ("Diebler Aff.") at ¶¶10-12.[5] The record contains

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[5] Agent Diebler states in his sworn declaration the following:

> As we reached the middle of the lobby [in the hotel] the man [Soroko] got out of his chair and moved quickly toward our formation. One of the agents sounded an alarm and we immediately "covered and evacuated." This is standard procedure. The agents closed the formation around Dr. Karadzic, got his head

conflicting affidavits regarding the attempted service. Soroko contends that he was no more than two feet from defendant, Soroko Aff. at ¶4, while Diebler contends that "the man [Soroko] could not have gotten any closer to Dr. Karadzic than 6-8 feet at the any closer to Dr. Karadzic than 6-8 feet at the most." Diebler Aff. at ¶13. It is not disputed, however, that during the attempted service, Soroko called out words declaring that defendant was served. Soroko Aff. at ¶4; Diebler Aff. at ¶12. Diebler asserts that prior to leaving the United States, Karadzic had no knowledge that Soroko was attempting to serve him with process. Diebler Aff. at 14.

On March 2, 1993, Kadic Plaintiffs filed their related complaint, alleging tortious conduct, including, inter alia, rape, forced prostitution, forced pregnancy, forced childbirth, and gender and ethnic discrimination. On March 4, 1994, after attempts by professional process servers proved unsuccessful, see K. Mem. at 2, see also, Deibler Aff. at ¶ 17, the Honorable

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> down, I held him physically and moved as quickly as possible to the waiting elevator.
>
> The man came right at me and I believe I was the first to physically touch him. As he approached he reached into his jacket and removed what I was told later turned out to be papers. I batted his hand away.
>
> After I batted his hand away, he was stopped and questioned by two of my agents...The man shouted words to the effect "You've been served. You've been served." By that time Dr. Karadzic and the agents evacuating him, including me, were about 30 feet away and ready to enter the elevator.
>
> Diebler Aff. at ¶¶ 12-13. After he attempted service, Soroko was questioned by agents, and informed them that he was attempting to serve process on Karadzic.

Richard Owen, United States District Judge, Southern District of New York, granted a motion for leave to effect service upon defendant by alternate means. On March 5, 1993, a copy of the summons and complaint was delivered by a United States Marshal to special Agent Diebler, who personally delivered them that day to Karadzic. See K. Mem. at 2-3; Deibler Aff. at ¶18. On May 10, 1993, Karadzic filed the instant motion to dismiss.

DISCUSSION

I. Karadzic's Motion to Dismiss

A. INITIAL CONSIDERATIONS

As an initial matter, this Court notes that "federal judicial power is limited to those disputes... which are traditionally thought to be capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968). It is well settled that no justiciable controversy is presented when the parties seek an advisory opinion. Id. at 95, 88 S.Ct. at 1949-50. Furthermore, "a judicial declaration subject to discretionary suspension by another branch of government may easily be characterized as an advisory opinion." Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, at §3529.1 (1984) (citations omitted).

Given that Karadzic's present lack of head-of-state immunity is conditioned upon a decision of the Executive Branch not to recognize a Bosnian-Serb nation and not to acknowledge Karadzic as an official head-of-state,[6] plaintiffs'

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[6] See Affidavit of Martha F. Davis submitted in Opposition to Defendant's motion to Dismiss ("Davis Aff.") at Exhibit C (letter from Michael J. Habib, Director of Eastern European Affairs, U. S. Department of State, discussing the Department of State's refusal to extend immunity to Radovan Karadzic during his visits to the United Nations).

claims for relief could potentially become a request for an advisory opinion if the State Department were to declare defendant a Head of State. "A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts." Lafontant v. Aristide, 844 F. Supp 128, 131 (E.D.N.Y. 1994) (Weinstein, J.). As the Aristide court held, the [d]etermination of who qualifies as a head-of-state is made by the Executive Branch, it is not a factual issue to be determined by the courts. No judicial hearing or factual determination aside from receipt of the State Department's communication is warranted." Lafontant v. Aristide, 844 F. Supp. at 130. In Aristide, after the State Department submitted a letter, filed with the Court by the Justice Department pursuant to 28 U.S.C. §517, the court promptly entered a final judgment, quashing service of process on defendant and dismissing the action. Id. (collecting cases in which absolute immunity was accorded a head-of-state) See In Re Doe, 860 F.2d 40, 44-46 (2d Cir. 1988). Were the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction. See Lafontant v. Aristide, 844 F. Supp at 130.[7] This consideration, while not

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[7] "[I]n Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988), residents of Libya brought suit against Prime Minister Margaret Thatcher of the United Kingdom, for alleged violations of international law. Pursuant to 28 U.S.C. §517 the State Department submitted an immunity letter, suggesting that the court grant Prime Minister Thatcher immunity as the head of government of a friendly foreign state. The court accepted the State Department's suggestion as conclusive, and granted immunity." Lafontant v. Aristide, 844 F. Supp. at 132. See Restatement (Second) of Foreign Relations Law of the United States (1962) § 66 (head-of-state can be either the head-of-state or head of government).

See generally Roger Cohen, Washington Might Recognize a Bosnian Serb State, N.Y. Times, March 13, 1994, at A10. (stating that as President of his nation, Karadzic may qualify as "an organ of a foreign state or political subdivision thereof" under the Foreign Sovereign Immunities Act ("FSIA"),

dispositive at this point in the litigation, militates against this Court exercising jurisdiction over the instant action.

B. SUBJECT MATTER JURISDICTION

Plaintiffs bring these related actions pursuant to the Alien Tort Claim Act; the Torture Victim Protection Act ("TVPA"); federal question jurisdiction; and the principles of supplemental jurisdiction. Doe Plaintiffs suggest in their memorandum submitted in opposition, that this Court should not address the issue of subject matter jurisdiction because defendant, who moved for dismissal pursuant to Fed.R.Civ.P. 12(b)(1), did not brief the issue. Doe Mem. at 3 n. 2. Nevertheless, "[i]t is common ground that in our federal system of limited jurisdiction any party or the Court sua sponte, at any stage in the proceedings, may raise the question of whether the court has subject matter jurisdiction." United Food & Commercial Workers Union v. Centermark Props. Meriden, 30 F.3d 298, 301 (2d Cir. 1994) (citation omitted). Accordingly, this Court must address the issue of subject matter jurisdiction.

1. This Court Does Not Have Jurisdiction Pursuant To The Alien Tort Claim Act

The Alien Tort Claim Act, 28 U.S.C. §1350, grants the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. Since plaintiffs do not contend that their claim arises under a treaty of the United States, this Court, in order to determine whether it has subject matter jurisdiction pursuant to § 1350, must examine whether the actions of defendant, alleged herein, constitute an actionable violation of the law of nations under

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28 U.S.C. §1603(b)(2), and therefore be immune from suit).

the statute.

The Second circuit has found that only conduct which rises to the level of an "international common law tort" by violating universally accepted standards of human rights is within the law of nations, and thus within the subject matter jurisdiction of the Act. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980). In Filartiga, the Second Circuit consulted modern sources of international law including judicial decisions and scholarly works, in order to determine what constituted the law of nations. Id. at 880-81 (citing The Paquete Habana, 175 U.S. 677, 700, 30 S.ct. 290, 299, 44 L.Ed.2d 320 (1900)).[8]

Historically, the "traditional view of the international law [was] that it establish[ed] substantive principles for determining whether one country had wronged another." Banco National de Cuba v. Sabbatino, 376 U.S. 398, 422, 84 S.Ct. 923, 937, 11 L.Ed.2d 804 (1964). "Classical international law was predominantly statist. The law of nations traditionally was defined as 'the body of rules and principles of action which

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[8] Beginning with Filartiga, courts have recognized a wide range of international common law torts, which, when committed under the color of state law, have been held to be actionable under the Alien Tort Act including, inter alia, torture, slave trade, and piracy, Filartiga, 630 F.2d at 890; genocide and cruel, inhuman or degrading treatment, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781, (D.C. Cir. 1984) (Edwards, J. concurring); summary execution, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) ("official torture constitutes a cognizable violation of the law of nations"); wrongful death, Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992); and war crimes. See also Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (holding war crimes to be universally recognized violations of international law, but not specifically considering the Alien Tort Act), cert. denied, 475 U.S. 1016 (1986). See also Louis Henkin, The Age of Rights 75-76 (1990).

are binding upon civilized states in their relation to one another.'" Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792 n. 22 (D.C. Cir. 1984) (Edwards, J.) (quoting J. Brierly, The Law of Nations 287 at 1 (6th ed. 1963)) (emphasis in original). Accord Carmichael v. United Technologies Corp., 835 F.2d 109, 113 (5th Cir. 1988)("The standards by which nations regulate their dealings with one another inter se constitute the 'law of nations.' These standards include the rules of conduct which govern the affairs of this nation, acting in its national capacity, in relationships with other nations.") (citations omitted). Over time, the view that international law applied only as between nations evolved, such that international law became applicable to nations acting against their own citizens or to a foreign government acting against an individual. See Filartiga, 630 F.2d at 884-85.

In Filartiga, the Second Circuit held that official torture constituted an actionable claim within the subject matter jurisdiction of the court under §1350. In reaching this conclusion the Second Circuit stated that "[t]orture...is defined as any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official." Id. at 882 (citing General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc A/1034 (1975))(emphasis added). The Filartiga Court went on to hold that acts of official torture committed by a government either against aliens, or against nationals of the acting state, violate the law of nations. Filartiga, 630 F.2d at 884-85. The Second Circuit, in Filartiga, reached the conclusion that "official torture is now prohibited by the law of nations." Id. at 885 (emphasis added).

Since Filartiga, §1350 has been applied by a handful of federal courts, and the decision reviewed by this Court reinforce the conclusion that acts committed by non-state actors do not violate the law of nations. Most notable, perhaps, is the opinion by the United States Court of Appeals for the District of Columbia in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.Cir. 1984). In Tel-Oren, survivors and representatives of persons murdered by the Palestine

Liberation Organization ("PLO") brought suit pursuant to 28 U.S.C. §§1350 and 1331. The District Court dismissed the action for lack of subject matter jurisdiction. The District of Columbia Circuit panel, writing three separate concurring opinions, affirmed the district court's dismissal. In his opinion, Judge Edwards embraced the holding of Filartiga, but specifically declined to extend Filartiga or the application of §1350 to non-state actors.[9] Judge Edwards stated that "[t]he extension would require this court to venture out of the comfortable realm of established international law -- within which Filartiga firmly sat -- in which states are the actors. It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals." Tel-Oren, 726 F.2d at 792. Judge Edwards also stated that the law of nations does not impose "the same responsibility or liability on non-state actors [] as it does on states and persons acting under color of state law." Id. at 776. Judge Edwards concluded that since "the PLO is not a recognized member of the community of nations" an action brought pursuant to §1350 would not lie. Id. at 792. Accordingly, Judge Edwards "decline[d] to read section 1350 to cover non-state actors, absent guidance from the Supreme Court on the statute's usage of the term 'law of nations.'" Id. at 795.[10]

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[9] Judge Bork found that §1350 did not provide a cause of action, and Judge Robb concluded that the case presented nonjusticiable "political question."

[10] It should be noted that causes of action have been brought against the PLO with Federal Courts basing their jurisdiction on other grounds. In Klinghoffer v. S.N.C. Achille Lauro, 739 F.Supp. 854 (S.D.N.Y 1990) jurisdiction was based on admiralty, pursuant to 28 U.S.C. §1333, and in United States v. Palestine Liberation Organization, 695 F.Supp. 1456 (S.D.N.Y. 1988) the cause of action was brought pursuant to the Anti-terrorism Act, 22 U.S.C. §§5201-5203.

Since Tel-Oren, a number of Federal Courts have applied §1350, but, in doing so, have also declined to extend it to cover the conduct of non-state actors. In Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C.Cir. 1985), a group of Nicaraguans brought a claim pursuant to § 1350, seeking redress for tortious injuries which they and their families suffered at the hands of the Nicaraguan Contra Forces ("Contras"). Id. at 205. Plaintiffs' claims arose out of alleged attacks by the Contras on Nicaraguan civilians which resulted in, inter alia, summary execution, murder, abduction, torture, rape, and woundings. Id. In holding that plaintiffs' claims could not be remedied under the Alien Tort Statute, Judge (now Justice) Scalia stated the following:

> "[w]e are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals. As for the law of nations --so-called 'customary international law,'arising from 'the customs and usages of civilized nations,'--we conclude that this also does not reach private, non-state conduct of this sort."

Id. at 206-07 (citations omitted). Accordingly, the District of Columbia Circuit dismissed the claims brought pursuant to §1350. Id. See also Linder v. Calero Portocarrero, 747 F. Supp 1452, 1462, 1469 n.8 (S.D.Fla. 1990) (stating "[t]he contras are private individuals whose actions simply do not represent state action," and that "[t]he Contras have not been recognized as the legitimate government of Nicaragua by the United States").

In Carmichael v. United Technologies Corp., 835 F.2d 109, 113 (5th Cir. 1988), the Fifth Circuit, while not deciding the issue, opined "that the Alien Tort Statute does not confer subject matter jurisdiction over private parties who conspire in or aid and abet, official acts of torture."[11] Id. at 113-14. In

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[11] The Fifth Circuit defined "official torture" as torture by officials shown to be officially condoned by the nation. Id. at 114. (emphasis added).

Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D.Cal. 1987), the district court echoed Justice Scalia's sentiments when it stated: "[o]f course, purely private torture will not normally implicate the law of nations, since there is currently no international consensus regarding torture practiced by non-state actors." Id. at 1541.

Courts that have found causes of action to lie pursuant to §1350, have done so when state actors violated the law of nations. See e.g., Filartiga, 630 F.2d at 880 (Paraguayan state official); In Re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493 (9th Cir. 1992) (defendant controlled military police and acted under martial law declared by then-President Marcos); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (Argentine military officials); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D.Cal. 1987) (former Argentine General).

This Court finds that the acts alleged in the instant action, while grossly repugnant, cannot be remedied through 28 U.S.C. § 1350. The current Bosnian-Serb warring military faction does not constitute a recognized state any more than did the PLO, as it existed at the time that the District of Columbia Circuit decided Tel-Oren, or than did the Nicaraguan Contras at the time Justice Scalia decided Sanchez-Espinoza.[12] Accordingly, this Court finds that the members of Karadzic's faction do not act under the color of any recognized state law. See, e.g., Sanchez-Espinoza v. Reagan, 770 F.2d at 202; Tel-Oren 726 F.2d at 791; Linder v. Calero Portocarrero, 747 F. Supp 1452, 1462 (S.D.Fla. 1990) ("[t]he

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[12] The Second Circuit has limited the definition of 'state' to "entities that have a defined and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other such entities." Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991) (quotations, brackets and citation omitted). The current Bosnia-Serb entity fails to meet this definition.

contras are private individuals whose actions simply do not represent state action").

The situation in the former Yugoslavia is such that the present military factions are less stable and less identifiable than was the PLO at the time of Tel-Oren. The Bosnian-Serbs have achieved neither the level of organization nor the recognition that was attained by the PLO, as manifested by the PLO's achieving the position of a permanent observer at the U.N.[13] Based on the teaching of the aforementioned case authorities, it follows that plaintiffs cannot contend that the acts allegedly being conducted are either official torture or state initiated. See Tel-Oren, 726 F.2d at 791. This Court declines to extend §1350 to redress acts of torture engaged in by private individuals.

2. This Court Does Not Have Jurisdiction Pursuant To The Torture Victim Protection Act

Plaintiffs also advance the position that this Court has subject matter jurisdiction based on the Torture Victim Protection Act ("TVPA"). See Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350). The TVPA provides an express private right of action against "an individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects another individual to torture or extrajudicial killing. Id. The TVPA was enacted to codify the private right of action against official torture set forth in Filartiga. LaFontant v. Aristide, 844 F. Supp at 138 ("[t]he TVPA codifies the holding in Filartiga v. Pena-Irala") (Weinstein, J.). See H.R. Rep. No 367, 102nd Cong., 1st Sess. 3-4 (1991) ("House

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[13] The PLO was granted permanent observer status at the United Nations in 1974, and "[s]ince 1974, the PLO has continued to function without interruption as a permanent observer and has maintained its mission to the U.N. without trammel." United States v. PLO, 695 F. Supp at 1459.

Report"), reprinted in 1992 U.S.C.C.A.N. 84, 85-86; S. Rep. No. 249, 102nd Cong., 2d Sess. 3-7 (1991) ("Senate Report").

The TVPA, a relatively new statute, passed in 1992, has been construed by only a few Federal Courts. This Court, having looked to the language of the statute and to the legislative history, concludes that both the language and legislative history clearly indicate that the statute only extends to actions carried out under the authority or color of law of an entity recognized by the United States as a foreign nation.

On its face the TVPA gives federal courts jurisdiction over suits against foreign officials who kill illegally on foreign territory. It provides in part:

> Sec. 2. (a) Liability. -- An individual who, under actual or apparent authority, or color of law, of any foreign nation -- (1) subjects an individual to torture shall, in a civil action, be liable for damages... or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages...
>
> (b) Exhaustion of remedies. -- A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

28 U.S.C. § 1350 note (1992) (emphasis added). As the House Report on the bill explains:

> [t]he phrase 'under actual or apparent authority, or color of law' makes clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim...The bill does not attempt to deal with torture or killing by purely private groups.

House Report at 5, USCCAN 1992, p. 87. Similarly, the Senate Report states the following:

> [t]his legislation does not cover purely private criminal acts by individuals or nongovernmental organizations...the phrase 'actual or apparent authority or under color of law' is used to denote torture and extrajudicial killings committed by officials both within and outside the scope of their authority.

Senate Report 249 at 8.

Clearly, the TVPA was designed to protect individuals from acts taken by foreign government officials or foreign governments. On its face, the TVPA requires a plaintiff's claim for relief to be based on actions taken under color of law of any foreign nation. The legislative history reflects the same reading. This reading of the TVPA is entirely consistent with and, indeed, supports this Court's holding with respect to the Alien Tort Claim act, supra, since the TVPA was also codified at §1350.

Both the Senate and House Reports state that courts should look to principles of liability under 42 U.S.C. §1983 in construing the "color of law" phrase in the TVPA. See Senate Report at 8; House Report at 5. A plaintiff can only meet the requirements of § 1983 to establish that a defendant has acted "under color of state law" if he alleges sufficient "state action" to make out a constitutional violation. The conduct of the defendant must be somehow chargeable to the state in question. See, e.g., Dwares v. City of New York, 985 F.2d 94, 97 (2d Cir. 1993) ("it is well established that in order to state a claim under §1983, a plaintiff must allege that the challenged conduct was attributable at least in part to a person acting under color of state law."); Merola v. Nat'l R.R. Passenger Corp., 683 F. Supp. 935, 940 (S.D.N.Y. 1988).

As discussed above, Karadzic does not act with the authority of any foreign nation. In fact, K. Plaintiffs' moving papers describe Karadzic as "neither a head of state nor a diplomat of a recognized state." K. Mem. at 5. K. plaintiffs further acknowledge that "Karadzic is not an official of any government." K. Mem. at 21 n. 25. Accordingly, finding that

the acts attributed to defendant are those of private individuals, similar to those of the Contras, and finding that the TVPA clearly was enacted to redress acts of torture by governments or government officials, plaintiffs' cause of action against defendant based on the TVPA cannot lie. [14]

3. This Court Does Not Have Jurisdiction Pursuant To An Implied Right of Action Under §1331

Plaintiffs also bring their causes of action under 28 U.S.C. §1331, subject matter jurisdiction arising under a federal question. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States."

It has been recognized in this Circuit that substantive international law is incorporated into the law of the United States. See Filartiga, 630 F.2d 876, 887 (2d Cir. 1980). As discussed above, jurisdiction in this action cannot lie based on the express causes of action set forth by Congress in the TVPA or the Alien Tort Claim Act. Accordingly, the only other jurisdictional grounds for Plaintiffs to assert in this matter would be to base their claims on an implied right of action arising out of the law of nations. As Judge Edwards stated in

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[14] Additionally, the Court notes that section 2 of the TVPA clearly requires litigants to exhaust the adequate and available remedies in the location of the tort. On the present record before this Court, there is insufficient evidence addressing whether plaintiffs have attempted to seek remedies in the place in which the conduct giving rise to the claim occurred, nor is there sufficient evidence shedding light on the issue of whether, given the present situation in former Yugoslavia, such remedies are available or would be adequate. See Amicus Curiae Memorandum Submitted in Opposition to Defendant's Motion by the International Human Rights Law group, dated August 27, 1993 ("IHR Amicus"), at 26, (noting "two criminal cases were recently brought in Sarajevo and resulted in death sentences").

Tel-Oren 726 F.2d at 779-80 n. 4., "the language of §1331, unlike §1350, suggests that plaintiffs must identify a remedy granted by the law of nations or argue successfully for one to be implied."

This Court declines to find an implied right of action arising under the law of nations, specifically in view of the fact that Congress has addressed the matter and created two express causes of action in the form of the Alien Tort Claim Act and the TVPA, codified at §1350. Presumably, Congress did not lack power to confer subject-matter jurisdiction over such an action, but declined to do so. See Senate Report at 5-6. See also Sugrue v. Derwinski, 26 F.3d 8, 12 (2d Cir. 1994) (declining to find a new private right of action, and stating that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation"). As Judge Kearse stated in Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 429 (2d Cir. 1987) (Kearse, J. dissenting), rev'd on other grounds, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989), "though substantive international law is part of the common law of the United States... federal court subject-matter jurisdiction is not a matter of common law. Such jurisdiction exists only to the extent that Congress has bestowed it, in the exact degree and character which to Congress may seem proper for the public good." Id. (citations and quotations omitted).

Further, as discussed above, "the law of nations provides no substantive right to be free from the private acts of individuals." See Tel-Oren, 726 F.2d at 779-80 n. 4; In Re Estate of Ferdinand E. Marcos, 978 F.2d 493, 501 (9th Cir. 1992)("[o]nly individuals who have acted under official authority or under color of such authority may violate international law"). Since private acts of individuals do not violate the law of nations, even assuming arguendo, that this Court were willing to attempt to find an implied cause of action, which it is not, this Court is doubtful that one could be implied as to the defendant because the acts attributed to him were performed in a private capacity. Accordingly, those allegedly harmed by the acts of defendant cannot assert an

implied right of action arising from the law of nations and § 1331. See Tel-Oren, 726 F.2d at 779-80 n.4.

Absent a clear statute from Congress, or direction from higher Courts, this court finds that actions based only on § 1331 without an express right of action granted by Congress, must be dismissed for lack of subject-matter jurisdiction.

II. Plaintiffs' State Law Claims

In general, "a district court may exercise supplemental jurisdiction over pendent state claims when it has jurisdiction over associated federal claims that 'form part of the same case or controversy.'" Sriram v. Preferred Income Fund, 22 F.3d 498, 501 (2d Cir. 1994) (quoting 28 U.S.C. §1367).[15] See United Mine Workers v. Gibbs, 383 U.S. 715, 725-28, 86 S.Ct. 1130, 1138-40, 16 L.Ed2d 218 (1966). As the Second Circuit has recently reiterated, a district court's exercise of supplemental jurisdiction is within its discretion. Vally Disposal, Inc. v. Central Vermont Solid Waste Management District, 31 F.3d 89, 103 (2d Cir. 1994)(citing Block v. First Blood Assocs., 988 F.2d 344, 351 (2d Cir. 1993) ("The decision whether to exercise pendent jurisdiction is within the discretion

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[15] 28 U.S.C. §1367, enacted Dec l, 1990, codified the law with regard to pendent party, pendent claim, and ancillary jurisdiction by granting federal district courts "supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Id. The statute abandons the old labels of pendent and ancillary jurisdiction, but preserves the principles established under the doctrines, referring to all such jurisdiction as "supplemental." See Denis F. McLaughlin, The Federal Supplemental Jurisdiction Statute--A Constitutional & Statutory Analysis, 24 Ariz. St. L.J. 849 (1992).

of the district court.")). See Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir. 1994) ("Just as with the prior law of pendent jurisdiction, the exercise of supplemental jurisdiction is left to the discretion of the district court.").

Having dismissed plaintiffs' federal claims, plaintiffs' state claims also should be dismissed for lack of jurisdiction. In general, in order to invoke supplemental jurisdiction, there must be an underlying cognizable federal claim. In this case, plaintiffs' federal claims have been dismissed. When the district court has dismissed all claims over which it has original jurisdiction, the court may decline to exercise supplemental jurisdiction. 28 U.S.C. §1367(c)(3). "'[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors... will point toward declining to exercise jurisdiction over the remaining state-law claims.'" Morse v. University of Vermont, 973 F.2d 122, 127 (2d Cir. 1992) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988)). See Gibbs, 383 U.S. at 726, 86 S.Ct. at 1139 (holding that the general rule is that, when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits). Thus, this Court declines to assert supplemental jurisdiction over plaintiffs' state claims. Accordingly, plaintiffs' state law claims are hereby dismissed.

CONCLUSION

For the foregoing reasons, this Court hereby grants Karadzic's motion to dismiss for lack of subject-matter jurisdiction. Accordingly, plaintiffs' claims are hereby dismissed in their entirety.

SO ORDERED

September 7, 1994
New York, New York

Peter K. Leisure

U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of January one thousand nine hundred and ninety-six.

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v

RADOVAN KARADZIC,

Defendant-Appellee.

STAMPED FILED
Jan. 26, 1996

Dkt. No: 94-9035
(94-9060)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee:

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /S/

Beth J. Meador,
Administrative Attorney

(2)

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

No. 95-1599

In the

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADZIC,

Petitioner,

v.

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNACIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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42 pp

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Should this Court review an interlocutory order on a motion to dismiss by a U.S. Court of Appeals recognizing federal subject matter jurisdiction under the Alien Tort Statute and the Torture Victim Protection Act over a complaint by alien women and children for mass torts of genocide, torture, war crimes, and crimes against humanity against the head of a *de facto* regime?

2. Should this Court review an interlocutory order on a motion to dismiss by a U.S. Court of Appeals recognizing personal jurisdiction over an alien personally served with process on the streets of New York City?

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COUNTERSTATEMENT OF THE CASE

Respondents are Bosnian women and children, alive and dead, survivors and victims of Petitioner's genocidal campaign to "ethnically cleanse" all non-Serbs from Bosnia-Herzegovina through war. Respondents were systematically raped and otherwise sexually tortured, forcibly impregnated, confined to rape/death camps for extermination, and brutally murdered because they are Muslim or Croatian rather than Serbian. Petitioner Radovan Karadzic designed and ordered this campaign to destroy non-Serbian peoples as such (Compl. ¶¶ 2-3, JA. 6-7)[1] in his official capacity as "President of Srpska" (Def. Stmt. ¶ 1, JA. 51), an ethnically Serbian insurgent regime he established within the territory of Bosnia-Herzegovina by killing, raping, expelling or imprisoning all civilians of other ethnicities. The genocide was, and continues to be, executed by the military forces under his command and control, and with the support and collaboration of the Serbian regime in Belgrade, Federal Republic of Yugoslavia (Serbia and Montenegro), a separate state. (Compl. ¶¶ 2, 18, 27, JA. 6-7, 12, 15.)

Respondents sued in the United States District Court for the Southern District of New York in March 1993, under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") and the Torture Victim Protection Act, 106 Stat. 73, *printed at* 28 U.S.C. § 1350 ("TVPA") for mass torts based on their sex and ethnicity, including rape, forced pregnancy, enforced prostitution, and extrajudicial killing in violation of statutes of the United States and the laws of nations against genocide, crimes against humanity, and the humanitarian laws of war. (Compl. ¶¶ 1-3, JA. 6-7.) Respondents sought an injunction and damages. (Compl., JA. 24.) Process was served pursuant to court order by U.S. marshals and special agents of the U.S. Department of State guarding Karadzic, *Kadic* v. *Karadzic*, No. 93 Civ. 1163 (S.D.N.Y. Mar. 3, 1994) (JA. 34-35), off

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1/ References to "Pet. __" are to Karadzic's Petition for a Writ of *Certiorari*. References to "JA. __" are to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

United Nations premises, while Petitioner was physically present in New York City.[2]

On Karadzic's motion to dismiss, principally asserting lack of personal jurisdiction based on alleged imputed immunities, the district court dismissed Respondents' complaint on grounds of lack of subject matter jurisdiction *sua sponte*. *Kadic* v. *Karadzic*, 866 F. Supp. 734, 744 (S.D.N.Y. 1994) (Pet. A-65). The district court noted preliminarily that, because Petitioner may in future head a state, exercise of subject matter jurisdiction was ill-advised because the case would become nonjusticiable and an opinion in it advisory. *Id.* at 737-38 (Pet. A-51-52). That court then deemed Karadzic a "private individual[]," unreachable by the law of nations. *Id.* at 742 (Pet. A-62). Claims for torture—claims the court deemed limited to official acts of a recognized state—were dismissed because "Karadzic does not act with the authority of any foreign nation." *Id.* (Pet. A-61). Without discussing plaintiffs' other claims, the district court dismissed all claims for lack of subject matter jurisdiction. *Id.* at 744 (Pet. A-65). Respondents appealed.

Reversing, the Court of Appeals for the Second Circuit held that federal subject matter jurisdiction exists under the ATS and the TVPA under these circumstances, "that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor," *Kadic* v. *Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (Pet. A-5), including for torture under TVPA standards, and that he was not immune from Respondents' service of process due to his status as a U.N. invitee or under a claimed federal common law immunity. *Id.* at 236, 246-47 (Pet. A-5, 28, 30). The Second Circuit further found the case justiciable, raising no political questions, relying in part on the Statement of Interest of the United States, which expressly stated that this litigation raised no political question (U.S. Statement of Interest at 3 (lodged as Exhibit A to *Doe* Respondents' Opposition)), and should be allowed to proceed.

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[2] Karadzic does not contest the sufficiency of plaintiffs' service of process.

Kadic, 70 F.3d at 248-50 (Pet. A-35-39). The court also found no alternate forum and remanded for further proceedings. *Id.* at 250 (Pet. A-39-40).

Following the return of the mandate, the district court set a date for Petitioner to answer (that date is May 22, 1996) and rejected his attempt to stay discovery pending the disposition of his application for a writ of *certiorari*. *Doe I* v. *Karadzic*, Nos. 93 Civ. 0878, 93 Civ. 1163, 1996 WL 194298, at *2 (S.D.N.Y. Apr. 22, 1996). After Respondents moved the district court to set a date for Petitioner to answer, over three years since the complaint was filed, Karadzic petitioned this Court for *certiorari* review.

REASONS FOR DENYING THE WRIT

I. *Certiorari* Review is Inappropriate and Premature

A. The District Court has Alternative Grounds for Jurisdiction

Petitioner seeks to dismiss this action principally on the ground that the Court lacks subject matter jurisdiction under the ATS. Wholly apart from the arguments advanced in the balance of this brief addressing this and other issues, a dispositive ground for denial of the writ exists in Respondents' claims for subject matter jurisdiction under the TVPA. Respondents have alleged facts that are entirely sufficient to state a claim under the TVPA; Petitioner does not challenge their legal sufficiency. The TVPA is a federal statute for violation of which federal subject matter jurisdiction exists under 28 U.S.C. § 1331. Jurisdiction over Respondents' other claims arising from the same set of operative facts is proper under the doctrines of supplemental jurisdiction. 28 U.S.C. § 1367.

Even if this Court were to grant review, it could not hold for Petitioner in the current posture of the case because this dispositive legal question is predicated on facts as to which Respondents' pleadings must be taken as true. 2A James W. Moore et al., *Moore's Federal Practice* ¶ 12.07 (2d ed. 1994). The

statutory language of the TVPA requires that an accused torturer act "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350. Respondents have alleged specific facts sufficient to meet this standard. (Compl. ¶¶ 9, 13-16, 27-29, JA. 9-11, 15.) To reverse the Second Circuit and grant Karadzic's motion to dismiss in the present posture of the case, this Court would have to find, on the facts as pleaded, that there are no circumstances under which Petitioner could be found to have had sufficient authority to be sued under the TVPA. This is simply impossible on the current state of the record.

There is no doubt that Respondents, in their TVPA claim, have validly asserted *a basis for* the exercise of federal subject matter jurisdiction over their claims in this case, a sufficient basis to reinstate the case below even if this Court rules for Petitioner on the issues presented. The dispositive availability of the TVPA as a ground for exercise of federal jurisdiction renders Petitioner's arguments concerning the ATS less significant.

B. The Issues Presented are Untimely and Not Ripe for Review

This petition seeks review of an interlocutory order denying a motion to dismiss. The interlocutory nature of a federal court of appeals judgment strongly affects the Court's discretionary assessment of the appropriateness of review. As Justice Scalia recently stated, "We generally await final judgment in the lower courts before exercising our *certiorari* jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of *certiorari*). The fact that a judgment below is not final—as is the case here—may "of itself alone furnish[] sufficient ground for the denial of the application [for *certiorari*.]" *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Unless the occurrence of the proceeding violates a litigant's right not to stand trial—and there is no such immunity asserted here—an order resulting in a trial does not, on that ground, become appealable as final. The fact that Karadzic is facing suit is

not itself an injury, and thus, proceeding to trial will not cause this litigant permanent harm, nor will a decision on the merits of this case be effectively irreversible on an appeal from a final judgment after trial.[3] Karadzic has not argued that the issues pressed here would be effectively unreviewable later; loss of "tourism" and "foreign investments" (Pet. 18) does not qualify as permanent harm. Moreover, Karadzic has claimed no right not to stand trial *per se*. The only immunity he asserts, that he was immune from service of process as a U.N. invitee—a substantively baseless claim—is not "effectively unreviewable" later, and thus is not immediately appealable under the collateral order doctrine. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527 (1988) (finding extradited person's claim to immunity from service of process under extradition treaty *not* reviewable collateral order).

Karadzic asserts *forum non conveniens* as a "question presented" (Pet. ii), but he never moved the district court to dismiss on this basis. Contrary to Petitioner's false assertion (Pet. 25), Respondents *have* pleaded, in no uncertain terms, that no alternative forum in which to assert their rights is available to them in their homeland. (Compl. ¶ 31, JA. 16.) The Second Circuit appropriately observed that no more suitable forum had been identified. 70 F.3d at 250–51 (Pet. A–39). That absence of evidence has yet to be filled, except by Petitioner's pleading of facts in his Petition that are false and contrary to the record. (Pet. 26.) Since the Second Circuit decision in this case, Karadzic has taken the position in the district court that *forum non conveniens* issues have yet to be determined (*See* Petitioner's Motion Pursuant to Fed. R. Civ. P. 16 and 6(b) and accompanying Declaration of Ramsey Clark ¶¶ 3, 5), yet here he argues that these issues are ripe for review by the Supreme Court. (Pet. 26.)

Stressing the fact-sensitive nature of *forum non conveniens* determinations, courts have consistently held that the denial of a motion for dismissal under the doctrine of *forum non conveniens* is

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3/ Karadzic has exerted major effort to prolong the preliminary legal aspects of this case and has avoided confronting its factual dimensions with particular persistence, thereby prejudicing Respondents.

outside the narrow range of non-final collateral orders amenable to interlocutory review. *See, e.g., Van Cauwenberghe*, 486 U.S. at 528; *Rosenstein* v. *Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 352, 354 (6th Cir. 1985). The Second Circuit rightly rejected the suggestion of *forum non conveniens* in this case. Where a genocide is in process, as here, its targets will be unlikely to have access to justice. This issue was properly resolved by the Court of Appeals[4] and is improperly raised here.

II. No "Compelling Reasons" Have Been Advanced to Support a Writ of *Certiorari*

A. The Second Circuit Ruling Recognizing Subject Matter Jurisdiction is Fully Consistent with the Law of the Circuits

Filartiga v. *Pena-Irala*, 630 F.2d 876, 887-89 (2d Cir. 1980), holding that 28 U.S.C. § 1350 provides federal subject matter jurisdiction for aliens to sue for torts that violate customary international law, is the settled law of the circuits. Since *Filartiga*, the courts of appeals have embraced its approach virtually without exception. *See, e.g., Abebe-Jira* v. *Negewo*, 72 F.3d 844, 846-47 (11th Cir. 1996) (applying *Filartiga* approach in affirming district court exercise of subject matter jurisdiction over ATS claim); *Hilao* v. *Marcos* (*In re: Estate of Marcos, Human Rights Litigation*), 25 F.3d 1467, 1472-74 (9th Cir. 1994) ("*Hilao*") (confirming that international law provides a basis for subject matter jurisdiction under ATS), *cert. denied*, 115 S.Ct. 934 (1995); *Bagguley* v.

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[4] Petitioner asserts that the International Tribunal for the Former Yugoslavia ("Tribunal") has asked other countries to avoid prosecutions "that might interfere with their proceedings." (Pet. 21.) In fact, the Tribunal has a formal deferral procedure which it has invoked in requesting Bosnia-Herzegovina to send Karadzic to the Tribunal for trial rather than try him in Bosnia, should he be apprehended. *In re Request for Deferral to Competence of Tribunal in re Karadzic et. al*, 1995 Int'l Trib. for Former Yugo., Case No. IT-95-5-D (May 16). The Tribunal has made no such request regarding the current proceeding, of which it has been well aware.

O'Donnell, 953 F.2d 660, 663 (D.C. Cir. 1991) (citing *Filartiga* in holding that prisoner had failed to demonstrate violation of an international treaty), *cert. denied*, 503 U.S. 995 (1992). Indeed, the *Kadic* claims for genocide, based on non-derogable *jus cogens* norms, are even more firmly established under "the law of nations" than official torture was when *Filartiga* was decided. In its assertion of ATS subject matter jurisdiction, the Second Circuit ruling in this case is an easy application of the correct principles that produced *Filartiga*, and of *Filartiga* itself, not an extension of either.[5]

Petitioner nevertheless argues that the Second Circuit's ruling in this case poses a direct conflict, worthy of this Court's *certiorari* review, with the D.C. Circuit's *per curiam* decision in *Tel-Oren* (Pet. 9, 13-14, 15), and its decision in *Sanchez- Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (Pet. 9), which are said to restrict the reach of the ATS to state actors. *Kadic* does not conflict with those opinions. Both leave open the possibility of suits for treaty and customary law violations against private actors, as well as suits against officials of *de facto* regimes like Karadzic, like those permitted by the Second Circuit in this case.

Sanchez-Espinoza was a suit by Nicaraguan citizens and others for redress of tortious injuries based on alleged U.S. support of the Nicaraguan "contras." Then-Judge Scalia, writing for the panel, recognized that certain "private, nongovernmental acts . . . are contrary to treaty or the law of nations . . ." but stated that the court was "aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals." 770

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[5] Moreover, a recent decision by the Eleventh Circuit demonstrates that there is simply no conflict in the circuits with respect to the actionability of such customary and *jus cogens* norms under the ATS. See *Abebe-Jira*, 72 F.3d at 844. In *Abebe-Jira*, the court held violations of *jus cogens* norms actionable in federal courts under the ATS, finding that the only opinion in conflict with its approach was Judge Bork's concurrence in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985), the concurring opinion of one judge. *Abebe-Jira*, 72 F.3d at 846.

F.2d at 206. The injuries of genocide and violations of the humanitarian laws of war alleged here, however, *are* prohibited by treaty. *See* Convention on the Prevention and Punishment of the Crime of Genocide, (Genocide Convention), Dec. 9, 1948, 78 U.N.T.S. 277; Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention No. IV), Aug. 12, 1949, 75 U.N.T.S. 287. Both treaties are ratified by the United States. Both, by their terms, prohibit harms of the kind and under the circumstances pleaded here, whether or not conducted by private individuals. *See* Genocide Convention, Article IV (persons committing enumerated acts defined as genocide shall be punished "whether they are constitutionally responsible rulers, public officials, or private individuals"); Geneva Convention No. IV, Art. 3 ("Common Article 3") (humanitarian provisions applicable to all parties engaged in internal conflicts and thus to entities other than states).[6]

By expressly leaving open the exercise of subject matter jurisdiction under ATS suits by aliens for treaty-based violations by private actors, the *Sanchez-Espinoza* ruling is consistent with a core Second Circuit holding in this case recognizing a federal forum under the ATS for claims for genocide and war crimes against Karadzic "in his private capacity. . . ." *Kadic*, 70 F.3d at 236 (Pet. A-5). There is thus no circuit conflict on the dispositive issue of this petition: whether *a basis exists* for exercise of federal subject matter jurisdiction over Respondents' claims.

On the larger jurisdictional issues under the ATS posed by petitioner, there is also no "'real and embarrassing conflict of opinion and authority between the circuit courts of appeal,'" *Powell* v. *Nevada*, 114 S. Ct. 1280, 1285 (1994) (Thomas, J., dissenting) (quoting *Layne & Bowler Co.* v. *Western Well Works, Inc.*, 261

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[6] The Genocide Convention was not before the Court in *Sanchez-Espinoza*. The Geneva Conventions were among many provisions before the district court but were not prominent on review and are not mentioned in the D.C. Circuit opinion, the lower court having dismissed political question grounds. *Sanchez-Espinoza* v. *Reagan*, 568 F. Supp. 596 (D. D.C. 1983).

U.S. 387, 393 (1923)). The D.C. Circuit in *Sanchez-Espinoza* expressly noted that its decision did not conflict with *Filartiga*, but rejected ATS jurisdiction for the violations of the law of nations claimed by plaintiffs in that case on the grounds that it "also does not reach private non-state conduct *of this sort* for the reasons stated by Judge Edwards' opinion in *Tel-Oren*." *Sanchez-Espinoza*, 770 F.2d at 206-07 & n.5 (emphasis added). The plaintiffs in *Tel-Oren* sought relief for unofficial acts of terrorism in peacetime. The court did not view the prohibitions on terrorism as *jus cogens*, nor were the PLO or the contras said to constitute a state-in-fact. *Tel-Oren*, 726 F.2d at 795-96 (Edwards, J., concurring) (finding that terrorism is not a violation of the law of nations). No official nexus was found between the PLO and any recognized state. The TVPA was not available as an independent, sufficient basis for exercise of federal subject matter jurisdiction in either *Sanchez-Espinoza* or *Tel-Oren*.[7]

Supporting the conclusion that no circuit conflict exists between the *Filartiga* line of cases and any circuit is the fact that this Court, under its prior lower standards for accepting review on

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[7] Petitioner argues that U.S. law should adopt the more global proposition for which he argues *Tel-Oren* and *Sanchez-Espinoza* stand: that international law can never provide ATS access against non-state actors. Judge Scalia discounted this proposition in the passage quoted above. In *Tel-Oren*, Judge Bork stood alone in this view, *Tel-Oren*, 726 F.2d at 798, Judge Robb not reaching the issue, *id.* at 803 n.8, and Judge Edwards limiting himself more closely to the law before him, rejecting Judge Bork's approach in significant respects and embracing the Second Circuit's *Filartiga* decision. *See id.* at 795 (Edwards, J., concurring). A conflict with a concurring opinion of one judge is not a conflict with a circuit. Moreover, Judge Bork's view is erroneous, as argued by plaintiffs and their *amici* below, and as recognized by the Second Circuit in *Kadic*, 70 F.3d at 239 (Pet. A-12). U.S. courts have long applied international law to nonstate actors for certain violations, such as piracy and crimes of war. *See Terrell* v. *Rankin*, 65 Ky. (2 Bush) 453 (1867) (applying law of war to acts of Confederate soldiers personally); *Adra* v. *Clift*, 195 F. Supp. 857, 862-65 (D. Md. 1961) (applying ATS to acts committed by private individual).

certiorari, has repeatedly denied the writ in ATS cases following *Tel-Oren*. *Kadic* presents nothing new. Indeed, several prior cases, including *Tel-Oren* itself, presented the question of subject matter jurisdiction for review, many of them asserting conflict among the circuits. *See, e.g., Tel-Oren*, 726 F.2d at 774; *Hilao*, 25 F.3d at 1467; *Trajano* v. *Marcos (In re Estate of Marcos Human Rights Litigation)*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). No prior case satisfied the lower "special and important reasons" then required to support a grant of *certiorari*. Against this background, the instant case certainly cannot be found to provide "compelling reasons" for *certiorari* after the recent "tightening of the Court's review standards." Robert L. Stern et al., *Supreme Court Rules: the 1995 Revisions*, 10 (1995).

B. The Decision Below Conforms With Relevant Supreme Court Precedent

1. No Conflict Exists with This Court's Ruling in *Amerada Hess*

Karadzic claims that the Second Circuit's ruling conflicts with this Court's decision in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), recognizing the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (the "FSIA"), as the exclusive basis for federal jurisdiction over foreign states and foreign sovereigns. (Pet. 10.) The defendant in *Amerada Hess* was a recognized state. Karadzic is an individual, not a recognized state, and the sovereign of none. Respondents did not sue "Srpska," and Srpska is entitled to no deference under FSIA, as the executive branch has not recognized it. *See Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 48-49 (2d Cir. 1991) (deference to executive branch decisions on recognition of foreign entities). *Amerada Hess* expressly leaves room for ATS suits "with respect to defendants other than foreign states." *Amerada Hess*, 488 U.S. at 438.

The attempt to create a nonexistent conflict between *Kadic*, in which an insurgent leader of a *de facto* regime is sued, and *Amerada Hess* is an oblique way for Karadzic to claim for the first time in this litigation that he is a sovereign, entitled to

sovereign immunity under FSIA. This is both incorrect and untimely.[8]

2. The Second Circuit Ruling that No Political Question is Posed by this Case is Supported by the U.S. and Raises No Issue for Review

Petitioner mistakenly claims that this case, analogous to *Tel-Oren* v. *Libyan Arab Republic*, involves nonjusticiable political questions (Pet. 22), thus presenting a circuit conflict and a conflict with Supreme Court precedent under *Baker* v. *Carr*, 369 U.S. 186 (1962). In *Tel-Oren*, Judge Robb rejected as a task for the courts the undertaking of any "consideration of terrorism's place in the international order." *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring). Petitioner ignores the fact that no court need assess the place of genocide in the international order. It has none. Respondents are not asking this Court to take a position on acceptable levels of genocidal activity or to confront conduct on which there is no international consensus. The instant case also presents no problem identifying the individual responsible for these acts. *Cf. Tel-Oren*, 726 F.2d at 823.

The Second Circuit decision is also fully consistent with this Court's ruling in *Baker* v. *Carr*, 369 U.S. 186 (1962). The United States executive branch—in a better position than Petitioner to assess whether these proceedings interfere with foreign policy—has unambiguously stated that this proceeding raises no political question: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." (U.S. Statement of Interest at 3 (lodged

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[8] Karadzic is unlikely ever to be a sovereign, if only because indicted war criminals like him, Indictment, Int'l Crim. Trib. for the Former Yugo. (July 24, 1995) (lodged as Exhibit B to *Doe* Respondents' Opposition) are precluded from holding office in Bosnia under the Dayton Peace Accords. Const. Bosnia and Herzegovina, Art. IX(1), Dayton Peace Accords, Annex 4 (Dec. 14, 1995).

as Exhibit A to *Doe* Respondents' Opposition)). The judgment of the United States on this score is certainly entitled to the respectful consideration that the Second Circuit gave it. *See Kadic*, 70 F.3d at 250 (Pet. A-39).[9] This case, raising no political question, clearly conforms to existing circuit and Supreme Court precedent and poses no question for review.

3. The Decision Below Applies Well-Settled Principles of Personal Jurisdiction and Does Not Conflict with the U.N. Headquarters Agreement

The Court of Appeals relied on one of the "most firmly established principles of personal jurisdiction in American tradition" in upholding the assertion of jurisdiction over Karadzic, who was personally served with process while physically present in New York City. 70 F.3d at 247 (Pet. A-29-30); *Burnham* v. *Superior Court*, 495 U.S. 604, 610 (1990). Although Karadzic fails to discuss this basic fact, he effectively concedes the point by raising a series of inapplicable immunities in an attempt to overcome the Court's jurisdiction over him, validly obtained by service of process in New York. To recognize any of his asserted immunities would require an unwarranted and drastic departure from established law.

Petitioner asks this Court to create an immunity where none exists. Persons entering a jurisdiction for the purpose of engaging in litigation can be immune from service of process,[10] but

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[9] U.S. courts have consistently recognized that not all cases involving foreign nations raise nonjusticiable political questions. *See Linder* v. *Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992); *Klinghoffer*, 937 F.2d at 49; *Tel-Oren*, 726 F.2d at 796 (Edwards, J., concurring). *See also Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964); *Abebe-Jira*, 72 F.3d at 848 (following *Linder*).

[10] Holding war criminals accountable vindicates the interest in peace that the U.S. negotiations sought. Thus, even if a parallel were to be made (continued...)

no such immunity from service of process exists for persons entering the jurisdiction for the asserted purpose of participating in United Nations functions. Petitioner asserts this immunity under "established law," citing not a single case. (Pet. 27-30.) The Court of Appeals declined for good reason Petitioner's invitation to create new law. First, the U.N. Headquarters Agreement sets forth the extent of immunities granted to U.N. personnel and, as the Court of Appeals correctly concluded, Karadzic falls within none of them. *Kadic*, 70 F.3d at 247-48 (Pet. A-31-32). Further, the United States has, in this litigation, reaffirmed its position that United Nations invitees, including Karadzic for the visit during which he was served, "enjoy no immunity from jurisdiction of the Courts of the United States." (U.S. Statement of Interest at 2-3; *see also* Habib Letter, JA. 108.) The United Nations has also taken this position on the applicable law. *In re Galvao*, 1963 U.N. Jurid. Y.B. 164 ¶ 4 (opinion of U.N. legal counsel that U.N. invitees are *not* immune from legal process outside the headquarters district); *Kadic*, 70 F.3d at 247 (Pet. A-32).[11] Where the U.N. itself expresses no need for immunity from service of process for its own

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[10](...continued)
between U.N. functions and litigation, this fact brings the present circumstances clearly within the exception to the common law immunity for service of process in litigation, where, as here, "the immunity itself, if allowed, would so obstruct judicial administration in the very cause for the protection of which it is involved as to justify withholding it." *Lamb* v. *Schmitt*, 285 U.S. 222, 228 (1932). *See also Cabiri* v. *Assasie-Gyimah*, No. 94 Civ. 3566, 1996 WL 191733, at *4-5 (S.D.N.Y. Apr. 18, 1996) (denying service immunity in TVPA case where defendant served in second action while being deposed as witness in first action).

[11] The United Nations filed an *Amicus Curiae* brief on behalf of the P.L.O. in *U.S.* v. *P.L.O.*, opposing the United States' request for an injunction closing down the P.L.O.'s observer mission at the U.N., asserting, in part, that the Headquarters Agreement required the U.S. to desist. *Amicus Curiae* Brief Submitted By and On Behalf of the United Nations at 2-3, *U.S.* v. *P.L.O.*, 695 F. Supp. 1456 (S.D.N.Y. 1988). The U.N. filed no brief in support of Karadzic's claim to shelter under the Headquarters Agreement.

invitees, it would be an unwarranted intrusion into U.N. affairs to create one.

Karadzic asserts that his claim for U.N. invitee immunity is an important issue of federal law. (Pet. 30.) But, as an issue of federal law, this claimed immunity does not exist—its importance in this litigation is to him alone. This issue is classically one that is not "of importance to the public as distinguished from that of the parties," disqualifying it from *certiorari* review. *Layne & Bowler*, 261 U.S. at 393.

Karadzic distorts judicial rulings in his attempt to support the insupportable in this connection. Contrary to his representations, the district court in *U.S.* v. *P.L.O.*, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988) held that subjecting the Palestine Liberation Organization ("P.L.O.") to the jurisdiction of the federal court did not interfere with its U.N. functions. That court also explicitly found and asserted jurisdiction over the P.L.O. based, in part, on its U.N.-related activities. *Id.* at 1461. Similarly, the Second Circuit, in *Klinghoffer* v. *S.N.C. Achille Lauro Co.*, 937 F.2d 44 (2d Cir. 1991), did *not*, contrary to Petitioner's representations, create a "functional immunity for the [P.L.O.] from personal jurisdiction because of its work as an invitee of the U.N." (Pet. 29.) In applying New York's long-arm statute to the P.L.O., the court held merely that the P.L.O.'s U.N.-related activities could not be fairly construed as "doing business" in New York for purposes of long-arm jurisdiction. *Id.* at 51-52. On remand, jurisdiction was found and asserted over the P.L.O. based on its non-U.N.-related activities in New York. *Klinghoffer* v. *S.N.C. Achille Lauro*, 795 F. Supp. 112, 114-15 (S.D.N.Y. 1992).

The Second Circuit properly upheld jurisdiction over Petitioner under *Burnham*. Moreover, even if some quantum of additional contact with New York were constitutionally required—which it is not—Petitioner, although he failed to so disclose in his petition, has admitted engaging in substantial fundraising and media activities while in New York. (JA. 141-44, 178.) These non-U.N.-related activities—together with the fact that Karadzic came to the U.S. voluntarily, made three separate trips each lasting

many days, did not remain within the U.N. headquarters district, and had a U.S.-provided security detail—unquestionably show that asserting personal jurisdiction here comports with due process. *See Burnham*, 495 U.S. at 638-39 (Brennan, J., concurring). It would depart radically from existing law to hold Karadzic "immune" after he purposefully availed himself of the financial and media benefits of the New York forum, *see Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 619-20 (1992) (finding jurisdiction over Argentina based on commercial activities in New York); *A.I. Trade Finance, Inc.* v. *Petra Bank*, 989 F.2d 76, 82 (2d Cir. 1993) (finding jurisdiction over foreign bank), and after he was served with process on the public streets of New York. *Burnham*, 495 U.S. at 619.

Furthermore, profound interests support the exercise of personal jurisdiction in this case. First, Respondents are victims and survivors of Petitioner's atrocities who brought their claims under U.S. statutes designed and interpreted to provide justice to aliens under precisely these circumstances, and there is no other court in which Respondents can receive civil redress for the severe injuries they have suffered. (Compl. ¶ 31, JA. 16.) In addition, New York has a strong interest in preserving its traditional right and ability to exercise jurisdiction over those who come physically into its territory and are legally served with process while present therein. Finally, Congress, in passing the TVPA and commenting on the ATS, has recently strongly reaffirmed the nation's original interest in seeing justice done in U.S. courts for victims of international human rights violations: "The [TVPA] also sends a distinct and forceful message that the United States will not host torturers within its borders." 137 Cong. Rec. H11244, 11245 (1991) (statement of Rep. Yatron). Refusing jurisdiction where the defendant is served while present in the United States, and purposefully avails himself of its facilities, protections and benefits would grant international human rights tortfeasors, like Karadzic, the safe haven in the United States that Congress, since the dawn of the nation, has intended to withhold. *See Filartiga*, 630 F.2d at 890; 137 Cong. Rec. H11244 (1991) (statements of Reps. Yatron, Mazzoli, Broomfield); 133 Cong. Rec. S3739 (1987) (statement of Sen. Spector).

III. The Second Circuit Correctly Adjudicated All Important Issues of Law

A. Karadzic's Atrocities are Redressable Under the Alien Tort Statute and the Torture Victim Protection Act

1. Karadzic Committed the Atrocities Alleged Under Color of Law

The Second Circuit was incontestably correct in ruling that Respondents have, where required, sufficiently alleged official action. 70 F.3d at 245 (Pet. A-25-26). Petitioner never confronts Respondents' allegations that he acted under color of law. Rather he simply asserts that he was a "private actor" engaged in "purely private conduct," and thus claims his acts are unreachable under either the ATS or the TVPA. (Pet. 12.)

Congress directed courts to the jurisprudence of 42 U.S.C. § 1983 for guidance in interpreting the TVPA's requirement that the torturer must have acted "under actual or apparent authority, or color of law, of any foreign nation." S. Rep. No. 249, 102nd Cong., 2d Sess. 8 (1991); H.R. Rep. No. 367, 102nd Cong., 1st Sess. 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 89. Under this law, Karadzic's actions are analogous to those of an off-duty police officer who dons his uniform and flashes his badge, and with racial animus falsely arrests a person, then brutally rapes them and beats them to death. *See Davis* v. *Murphy*, 559 F.2d 1098, 1101 (7th Cir. 1977) (off-duty officers acted under color of law when they identified themselves as officers and carried their badges and guns). Karadzic has seized the instrumentalities of state power and proceeded under the mantle of their claimed legitimacy to effectuate his aims to create, by force of arms against non-Serbian civilians, an ethnically pure official entity. Acts under such circumstances are clearly "under color of law." *See, e.g.*, *Keller* v. *District of Columbia*, 809 F. Supp. 432, 436 (E.D. Va. 1993) (officers who purported to arrest motorist outside their jurisdiction acted under "color of law" notwithstanding lack of actual authority because stop, use of firearms and physical restraints

made possible by fact that officers were clothed with state power). Karadzic's Serbs running Srpska is like the Klan running Georgia—obviously it would be state action. *See, e.g.*, *Marsh* v. *Alabama*, 326 U.S. 501, 508 (1946) (finding that corporate owner that performed all necessary municipal functions of town acted under "color of law" when it denied access on religious basis).

The "color of law" doctrine comprehends that action may be sufficiently official to be "under color of state law" and at the same time not trigger any immunity based on that official status. *Vector Research Inc.* v. *Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996). In *Vector Research*, the plaintiffs alleged that attorneys who opposed them in another action acted "in concert with" federal marshals when they together executed an *ex parte* order for a search, subsequently vacated as unconstitutionally overbroad. *Id.* at 698. The Sixth Circuit found that the plaintiffs had sufficiently alleged that the defendant attorneys were "federal agents or actors" in executing the *ex parte* search order, and that a claim against the attorneys had thus been stated for violation of the plaintiffs' constitutional rights. *Id.* At the same time, the Court of Appeals denied the defendant attorneys' claims for qualified immunity, reasoning that the "rationale for granting qualified immunity to public officials—that they would act decisively in their jobs for the public good without fear of being sued—did not apply with equal force to private parties acting for their own ends." *Id.* at 699 (citing *Wyatt* v. *Cole*, 504 U.S. 158, 167-68 (1992). *Vector Research* shows that state action jurisprudence comprehends the consistency in the position that acts can be official enough to be "under color of law," yet, when performed by persons who are not officials of legitimate entities, lack immunity based on such status.

2. The Second Circuit's Application of the Alien Tort Statute is Consistent with the Intent of the First Congress

With great fanfare, Petitioner offers purported historical support for his claim that the ATS was intended to apply only to state actors: a lone law review article—Joseph Modeste Sweeney,

A Tort Only in Violation of the Law of Nations, 18 Hastings Int'l & Comp. L. Rev. 445 (1995) [hereinafter "Sweeney"]—first cited on Petitioner's motion for rehearing before the Court of Appeals and rejected as unpersuasive. *Kadic* v. *Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) (Pet. A–43) ("Professor Sweeney's argument is . . . far from conclusive."). Professor Sweeney argues that the ATS was originally intended to be limited to tort actions under the law of prize. Sweeney, at 451. Hardly final, Professor Sweeney's article has been superseded by a more recent and more authoritative law review article showing it to be interpretively erroneous, logically flawed, and historically wrong. *See* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 256 (1996). Professor Dodge's article reveals that the Second Circuit's interpretation of the ATS in this case is completely consistent with the intent of the First Congress. *Id.*

History refutes Professor Sweeney's argument that the term "tort" in the ATS was meant to be limited to prize cases. *Id.* at 245–48. First, the plain language of the ATS, as originally passed, conferred jurisdiction for "*all* causes where an alien sues for a tort only in violation of the law of nations and or a treaty of the United States," contradicting Professor Sweeney's historical gloss on its face. *Id.* at 232 (quoting Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added)). Second, "tort" was a familiar term at the time of the First Congress, meaning much what it means today. *Id.* at 245-46. The First Congress understood that a variety of torts outside the prize context violated the law of nations, including torts that violated safe conducts, torts against ambassadors, and torts committed during acts of piracy, all of which Blackstone identified as violations of the law of nations and all of which would typically not be committed under any state authority. *Id.* at 232–33 (citing 4 William Blackstone, Commentaries *68). Third, federal courts already had jurisdiction over capture and prize cases under their admiralty and maritime jurisdiction, rendering the ATS redundant, were it so limited. *Id.* at 246–51. *See also Amerada Hess*, 488 U.S. at 436-37 (noting that the ATS "makes no mention of prize jurisdiction . . . .."). With all

respect to the academy, a law review article does not create *certiorari* jurisdiction.

B. The Nuremberg Precedents Do Not Require State Action

Karadzic purports to find support in the Nuremberg cases for his argument that the court below erred because "private actors," including those who perpetrate a genocide, are beyond the reach of international law unless they act under color of law of a recognized state. (Pet. 13.) In so doing, he ignores Respondents' allegation, here taken as true, that Karadzic is acting under color of law of a full-fledged state—the Federal Republic of Yugoslavia. (Compl. ¶ 27, JA 15.)[12] He also misrepresents history. Individual criminal liability at Nuremberg was never confined by law to those acting "in concert with the Nazi government." (Pet. 13.)

The Nazis, who designed and executed the genocidal plan, controlled the state of Germany; the genocide was substantially committed in collaboration with that state. But state action was not a required element for the offense of war crimes.[13] Rather, a Nuremberg defendant was not permitted to use the fact that he acted "pursuant to orders of his Government" as a defense to "free

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12/ Although Respondents need no further factual support on this posture of the case, the United States, in its *amicus curiae* brief in *Prosecutor* v. *Tadic*, 35 I.L.M. 32 (Int'l Crim. Trib. for the Former Yugo. 1996) ("*Tadic*"), before the Tribunal, expressly documents the extensive cooperation and support of the Federal Republic of Yugoslavia in the Bosnian Serb campaign at issue in this case. Submission of U.S. at 29–31, *Tadic*. Dusko Tadic was indicted by the Tribunal for criminal acts, including genocide and crimes against humanity, in a concentration camp (Omarska) maintained under Karadzic's orders and control, in which some of the plaintiffs in this case were held and violated.

13/ Crimes against peace, by contrast, were deliberately limited to violations by high level state actors or prominent members of a country's economic life— *i.e.*, those who were in a position to influence state policy. 15 *Law Rep. of Trials of War Criminals* 144–46 (1949).

him from responsibility . . . ." Nuremberg Charter, Article 3, *quoted in The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946). Moreover, under Article 7 of the Charter, "[t]he official position of defendants . . . [could] not be considered as freeing them from responsibility, or mitigating punishment." *Id. See also* Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* 28-29 (1992).

Thus, the doctrine of individual liability enshrined at Nuremberg was not intended to limit the class of persons who could be liable for war crimes or crimes against humanity, and thereby immunize potential war criminals from prosecution, as Karadzic seeks to do here. It was intended instead to prevent people who *were* acting under color of law from evading prosecution for their acts on that basis. The point was, and is, not that acts are more culpable because of office, but that perpetrators cannot hide from responsibility for their acts behind the cloak of their office. *See Nuremberg Tribunal, Nazi Conspiracy and Aggression, Opinion and Judgment* (1947) (authors of acts condemned as criminal by international law "cannot shelter themselves behind their official position in order to be freed from punishment . . . ."), *quoted in Hirota* v. *MacArthur*, 338 U.S. 197, 213 (1949) (Douglas, J., concurring). Once stripped of such a shield, their responsibility for their actions was, and is, no different from individuals who never held such office to begin with—that is, they are as legally responsible for their actions as any private individual.

The cases involving German industrialists mentioned by Karadzic (Pet. 13) support this view, not his. In one leading case, for example, private industrialists charged with war crimes argued, much as Karadzic (in one of his voices) argues here, that "they were private individuals holding no public official positions and that as they did not represent the State in any capacity, they could not be criminally liable for violations of international law." *In Re Flick and Others*, U.S.M.T., Nuremberg, Germany, December 22, 1947, *reprinted in* 1947 Ann. Dig. & Rep. Pub. Int'l. L. Cases 267. The defendants thus specifically disavowed any connection with the State as an element of their defense. *Id.* at 267. The court found

> [t]he distinction . . . unsound. International law . . . binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. . . . The offender in either case is charged with personal wrong, and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty.

Id. at 269.

But Karadzic is not like the German industrialists.[14] He planned, ordered, and executed this genocide, in part through seizing various instrumentalities of the state of Bosnia-Herzegovina, in part through operating as an arm of Belgrade. His position, in seeking to straddle the public/private line, would bar liability for genocide by public and private actors alike—that is, for everyone. In petitioner's view, a state official or person under its authority who committed genocide "under color of law" would be immune—since, he argues, "[a]s against a sovereign and persons acting under its authority tort claims for injuries occurring outside the territorial jurisdiction of the United States arising from violations of the law of nations brought in federal courts are barred by the FSIA." (Pet.

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[14] It is difficult to take seriously petitioner's assertions that he is merely akin to "Jack the Ripper," (Pet. 13) (not exactly a ringing endorsement) when he persists in interviews such as the following, which appeared on BBC "Nine O'Clock News," 2000 GMT on 21 June, 1995, in a report from Pale by John Simpson on the Bosnian Serb taking of UN hostages:

Simpson: Of course many people in Serbia, for instance, in Belgrade, thought that it was perhaps the action of individual commanders in the field, and that you hadn't necessarily given the orders yourself to take UN people hostage?

Karadzic: I always back my military commanders.

Simpson: That sounds as if it were their idea, rather than yours?

Karadzic: No, no, *we function as a state and I am the Supreme Commander in Chief*, and everything my army does I do back.

FBIS-EEU-95-120, 22 June 1995 (emphasis added).

11.) At the same time, a "private" actor—as he claims to be contrary to the pleadings and his own affidavit (Def. Stmt. ¶ 1, JA. 51)—would be exempt for failure to act under color of law. (Pet. 13.)

Throughout this litigation, Karadzic has been private when avoiding liability under international law, public when seeking immunity from it. Many of the substantive laws under which plaintiffs seek to hold him accountable, like prohibitions on genocide and the war crimes alleged, apply whether he is a private or a public actor. At the same time, as the Second Circuit saw, as leader of a *de facto* regime, he is sufficiently official to be held accountable for public torture, yet lacks the recognition and legitimacy to be a sovereign, and therefore is not even arguably immune from civil accountability. *See Kadic*, 70 F.3d at 245 (Pet. A-25).

Karadzic's argument is also contradicted by the accepted doctrine of universal jurisdiction for acts committed by *hostis humani generis*, *see Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), which he has entirely ignored. Under this doctrine, his own argument that he is a private actor merely places him, for purposes of international law, in the same category as pirates and slave traders—subject to universal civil and criminal jurisdiction as an enemy of mankind. *See Filartiga*, 630 F.2d at 890.

C. The Second Circuit Correctly Adjudicated Plaintiffs' Treaty-Based Claims

1. The Treaties Relied Upon Provide the Basis For Subject Matter Jurisdiction

Petitioner argues that the Court of Appeals erred in allowing Respondents to sue for genocide and torture because the treaties they relied upon are not self-executing and therefore cannot provide the basis for federal subject matter jurisdiction under the ATS or directly. (Pet. 12.) This argument is without merit.

To begin with, Respondents' claims for torture are covered autonomously under the TVPA. Petitioner's entire argument as to whether these treaties are self-executing is therefore academic because it does not determine the outcome of his motion to dismiss. Even if this were not the case, however, Respondents would be entitled under the ATS to a federal forum for their claims under, *inter alia*, laws against genocide and humanitarian laws of war, both as "treaties" and as "law of nations."

Prohibitions on genocide and egregious war crimes, claimed violated by plaintiffs, do not need to be executed to be accessible to plaintiffs under the circumstances alleged and argued. These provisions are part of the unquestionable, and unquestioned, law of nations for torts in violation of which the ATS, by its plain language, provides a federal forum. *Filartiga*, 630 F.2d at 887. Indeed, petitioner questions neither that the prohibition on genocide is customary law nor that customary law constitutes the "law of nations" under the ATS. He does not question the axiom that international law is the law of the United States and binds U.S. courts.

Nor does Karadzic point to a conflict among the circuits with respect to the *jus cogens* nature of the prohibition on genocide. As the International Court of Justice ruled in 1951, "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (1951). All courts that have considered the issue are unanimous in considering the prohibition against genocide as one of the most fundamental known. *See, e.g., Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (citing Restatement (Third) of the Foreign Relations Law of the United States (1987) ("Restatement"), § 702 cmt. n), *cert. denied*, 507 U.S. 1017 (1993). Similarly, it is well-established that laws prohibiting rape, torture and murder of civilians during armed conflict, embodied in the Geneva Conventions, constitute "[t]he core of customary law" applicable in such conflicts. Theodor Meron, *War Crimes in Yugoslavia and the Development of*

International Law, 88 Am. J. Int'l L. 78, 79 (1994). *See also Linder*, 963 F.2d at 336 (murder and other heinous acts committed by rebels during internal armed conflict violate customary international law).

Therefore, the opinion below is consistent with other circuit decisions in relying on fundamental norms prohibiting genocide and egregious war crimes as the "law of nations" actionable under the ATS. Nor does the opinion below err in relying upon the treaties cited as evidence of the law of nations, since courts routinely rely on such provisions as evidence of and interpretive guides to the content and nature of such norms. *See, e.g.*, *Carmichael* v. *United Technologies Corp.*, 835 F.2d 109, 113 (5th Cir. 1988); *Filartiga*, 630 F.2d at 882-84.

Furthermore, apart from their status as customary law, the normative treaty provisions relied upon by plaintiffs, such as those prohibiting genocide and requiring humanitarian treatment of civilians in armed conflicts, are arguably self-executing, because they do not enforce criminal prohibitions but instead embody an "obligation not to act, or to act only subject to limitations. . . ." Restatement § 111(3) n.5. *See also Commonwealth* v. *Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878), *quoted in id.*; *U.S.* v. *Noriega*, 808 F. Supp. 791, 797-99 & n.8 (S.D. Fla. 1992) (stating in *dicta* that normative provisions of Third Geneva Convention Relative to The Treatment of Prisoners of War are self-executing). *But see Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring) (Geneva Convention No. IV is not self-executing). Respondents are not seeking to convict Karadzic of a crime in the United States, or even to have the United States abide by its own obligations under the treaties. Rather, they are asking the Court to recognize that Karadzic's conduct is civilly actionable by his victims as a violation of the laws against genocide and the laws and customs of war—specifically, Common Article 3 if the conflict is found to be an internal one, or under both it and the remainder of the Geneva Convention No. IV if, as plaintiffs have pleaded and the U.N. and

the U.S. have determined, the war is an international one.[15] *See* Submission of U.S. at 7, *Tadic*. The standards set forth in these treaties clearly "prescribe a rule by which the rights of the private citizen . . . may be determined." *The Head Money Cases*, 112 U.S. 580, 598-99 (1884). The court below did not err in relying on those standards as a basis for subject matter jurisdiction under the ATS.

2. The Decision Below Is Consistent with the Treaty Implementation Acts

By arguing that the Genocide Convention Implementation Act, 18 U.S.C. § 1091 (1988), by its terms precludes plaintiffs from suing for genocidal torts under the ATS (Pet. 12), Karadzic appears to be arguing that Congress has repealed the ATS to the extent it permits civil actions against persons who engage in genocide. However, as noted above, the prohibition on genocide is firmly established as a core normative principle in the law of nations. The Genocide Convention thus manifests the universality of *jus cogens* norms prohibiting genocide; it does not create them. As a nonderogable norm *jus cogens* and as customary international law, genocide would remain civilly actionable as part of "the law of nations" under the ATS, whether or not the Genocide Convention were separately implemented.

Karadzic also fundamentally misconstrues the legal role of the implementation acts. These statutes are part of the federal *criminal* code and address only the domestic implementation of the treaties for criminal purposes. The purpose of Congress in

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15/ The International Court of Justice ("ICJ") regards Common Article 3 as expressing general principles of humanitarian law, applying not only in internal conflicts but as "constitut[ing] a minimum yardstick" for international armed conflicts as well. *Nicaragua* v. *United States*, 25 I.L.M. 1023, ¶¶ 218-20 (Int'l Ct. of Just. 1986). So does the Tribunal, which has ruled that Common Article 3 is customary international law and applies whether the instant conflict is deemed internal or international. *Tadic*, 35 I.L.M. at ¶¶ 116, 117. In his petition, Karadzic has abandoned his prior claim that the war *sub judice* is internal, not international.

implementation was to limit criminal liability for citizens and to avoid creating a new civil cause of action, not to restrict the civil liability of aliens to aliens or to limit human rights that already existed. Thus, while the Acts do not "creat[e] any substantive or procedural right . . . enforceable . . . in any civil proceeding," Torture Convention Implementation Act, 18 U.S.C. § 2340B (1994); Genocide Convention Implementation Act, 18 U.S.C. § 1092, neither do they repeal the pre-existing and continuing right to enforce such claims civilly through the ATS. *Kadic*, 70 F.3d at 242 (Pet. A-19).

Congress made this clear when it enacted the TVPA in 1992, four years after it passed the Genocide Convention Implementation Act. The legislative history of the TVPA reveals it was meant to codify the existing cause of action for official torture recognized by *Filartiga*, in light of skepticism expressed by Judge Bork in *Tel-Oren*. *Kadic*, 70 F.3d at 241 (Pet. A-15). Congress expressly declined to repeal or restrict the ATS at that time, moving in the opposite direction to "permit suits based on . . . norms [other than torture and summary execution] that already exist or may ripen in the future into rules of customary international law." *Id.* (quoting H.R. Rep. No. 367, 102nd Cong., 2d Sess., 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86).[16] For the same reason, the Torture Convention Implementation Act, 18 U.S.C. § 2340A, which limits criminal jurisdiction to torturers who are nationals of or present in the U.S., cannot be said to have repealed the TVPA by imposing similar limitations on civil jurisdiction.

Construing the Implementation Acts to the contrary would violate the fundamental principle of United States law, first

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[16] This Court's decision in *Amerada Hess*, 488 U.S. at 428, holding that the FSIA constituted a repeal of the ATS insofar as the latter statute might have provided jurisdiction over foreign states, is entirely distinguishable. The FSIA is a comprehensive statutory scheme setting forth exclusive bases for jurisdiction over foreign sovereigns in U.S. courts. The two acts at issue here create new classes of federal crimes and penalties, and as such "readily could be seen as supplementing" the ATS, which provides a basis for civil action only. *See id.* at 438.

enunciated by Chief Justice Marshall in *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 113 S. Ct. 2891, 2918 (1993) (Scalia, J., dissenting) (quoting same).[17]

Unless there is a clear and unequivocal expression of Congressional intent to supersede and abrogate the provisions of the Genocide and Torture Conventions—setting the United States against *jus cogens* and customary international law—the Acts cannot be construed to preclude the courts from granting access by aliens to the prohibitions of international law in an otherwise proper case.[18]

IV. Kadic is a Mass Tort Case, not a Political Intervention

Petitioner suggests that only political zeal and delusion could motivate this lawsuit for relief from genocidal mass rape and murder. (Pet. 19–20.) These women, he reiterates, are not Americans, and their injuries happened very far away. (Pet. 20.)

17/ As further elaborated by this Court in *Chew Heong* v. *United States*, 112 U.S. 536, 540 (1884):

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected.

18/ As the brief for the United States in Tadic stated, "[t]he relevant law and precedents for the offenses in question here—genocide, war crimes and crimes against humanity—clearly contemplate international *as well as national* action against the individuals responsible." Submission of U.S. at 20, *Tadic* (emphasis added).

This is itself nothing but a political argument, for which the proper audience is Congress, which has already decided—once at the founding of the Republic and once again only a few years ago—to provide aliens *so called* with the two federal causes of action invoked by Respondents. Besides Congress, Karadzic's other proper target for this argument is the universal human consensus that the extermination of a people as such violates the rules of civilization, including the emerging view that the violation of the women of a community violates that community. The courts are not his forum for these arguments.

Moreover, Petitioner misses the point that universal jurisdiction over certain human rights violations is most needed when access to judicial relief is least likely to be available domestically. Genocide provides a particularly pointed example. Wherever an ethnic group is capable of being destroyed as such, the society and its laws have failed that group to the point that no recourse will be available to its members for otherwise ordinary crimes against them like murder, assault, and rape. Almost by definition, the human rights of victims of a genocide will have to be vindicated elsewhere, at least temporarily. This is why, under the principle of universal jurisdiction, "neither the nationality of the accused or the victim(s), nor the location of the crime is significant." *Demjanjuk* v. *Petrovsky*, 776 F.2d at 582-83 ("the prosecuting nation is acting for all nations. . . ."). It is also why exhaustion of remedies is generally not required "'when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile,'" *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (quoting S. Rep. No. 249, 102d Cong., 1st Sess. 10 (1991)), as they are here.

The abstract sovereignty arguments that animate Karadzic's petition amount, in this setting, to suggesting that we must respect the sovereignty of other nations by allowing their genocidal war criminals to remain unaccountable when they come here, because we would not want our nationals held accountable for similar acts when they go there. That is, we should let them get away with genocide there because we want to be able to get away with genocide here. Presumably, to state this argument is to refute

it. It is also contrary to the direction of international human rights worldwide, as the Appeals Chamber of the Tribunal recently observed, in the context of virtually the same factual and legal issues posed in this case, upholding the Tribunal's exercise of subject matter jurisdiction: "A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach." *Tadic*, 35 I.L.M. at ¶ 97. To reject a "humar ' ing-oriented" approach in this case, as Petitioner urges, would reduce Respondents' international human rights to a nullity in the country that is most known for respecting them.

Karadzic argues that U.S. courts will be flooded with human rights litigants if these women's human rights are permitted access to court. First, when human rights begin to apply to women is a most inappropriate point to decide that the doors of the courthouse are now to be closed, because there are so many women and so many violations of women's human rights. *See Report of the Fourth World Conference on Women*, at 95 ¶ 224, U.N. Doc. A/CONF.177/20 (prov. ed. 1995). Second, in reality, Petitioner has the floodgates argument backwards. If genocide is condoned and perpetrators like Karadzic are allowed to proceed with impunity, there will be a flood of genocides, and unremitting pressure and expense to address them.[19] If Karadzic is held accountable, decisively, others may be deterred. Third, the ATS and the TVPA have built into them far too many screening devices and limiting principles to lend any credibility to Petitioner's argument that, if his victims can sue him, international victims the world over will deluge the U.S. federal courts. Karadzic masks these devices because they do not apply to him: for example, because there is no political question here, because he is not a

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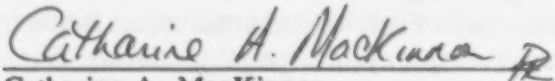
19 In one recent ruling squarely under *Kadic* for torts of genocide in Rwanda, the district court, awarding plaintiffs over $100 million, described "conduct so inhuman that it is difficult to conceive of any civil remedy which can begin to compensate the plaintiffs for their loss or adequately express society's outrage . . . ." *Mushikiwabo* v. *Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409, at *1 (S.D.N.Y. Apr. 8, 1996). This is the kind of case in which Petitioner seeks to preclude relief altogether.

sovereign, because his acts are not acts of state, because this is a genocide, and because his is a war of war crimes. Given these limits, women's human rights and the dockets of the federal courts are equally protected in allowing this case to proceed on the merits.

CONCLUSION

For the foregoing reasons, the petition for the writ of *certiorari* should be denied.

Dated: New York, New York
May 13, 1996



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No. 95-1599

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADŽIĆ,

Petitioner,

—vs.—

JANE DOE I, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a federal district court may exercise original jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), over a suit by an alien, for torts only, committed in violation of the law of nations by the leader of an unrecognized state.

(2) Whether an individual who subjects individuals to torture and extrajudicial killing under the actual or apparent authority of a foreign nation may be held liable for civil damages to those individuals under the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (1994).

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SUMMARY OF ARGUMENT

Respondents Jane Doe I, *et al.*, oppose Radovan Karadžić's petition for a writ of certiorari because the decision below is correct and warrants no further review, particularly in its current interlocutory posture. Petitioner seeks review of a unanimous jurisdictional ruling, supported below by the Solicitor General and the State Department, upon which the circuits are not divided, which presents no extraordinary issue, and which simply remands for pretrial proceedings currently ongoing before the U.S. District Court for the Southern District of New York.

Petitioner now asks this Court to disrupt these proceedings to consider a confused welter of fact-specific questions, none of which comes close to raising the "compelling reasons" required by Supreme Court Rule 10. Review of any of these seven questions would be entirely premature. Substantial pretrial orders have been issued by the district court, and the factual record will soon be dramatically expanded. Should Respondents win at trial and again on appeal, this Court would be free to review that judgment on a fully developed record, avoiding the needless piecemeal litigation that granting this interlocutory petition would engender. Nor would granting certiorari now likely affect the outcome of this case. Petitioner challenges only two of the three jurisdictional grounds relied upon by the Second Circuit. Even if this Court were to grant certiorari and reverse on those grounds, the lower court would likely reinstate its decision based on Respondents' allegation that Petitioner committed torture and summary execution under color of the law of Yugoslavia, and thus should be held liable under the federal question provision, 28 U.S.C. § 1331 (1994), and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (1994) ("TVPA"). This Court should not waste its scarce resources on such pointless interlocutory and advisory review.

More fundamentally, Questions One and Two challenge a unanimous Court of Appeals decision that is plainly correct and supported by an unbroken line of federal court rulings. Fol-

lowing the precise words of the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) ("ATCA" or "§ 1350"), the Second Circuit held that a federal district court may exercise original jurisdiction over a suit by an alien, for torts only, committed in violation of the law of nations. No clearer violations of the law of nations could have occurred than the massive acts of genocide, war crimes, and crimes against humanity committed by Petitioner Karadžić. The Court of Appeals correctly construed the ATCA by applying it to a modern-day international criminal who orders genocidal atrocities to secure and consolidate his rule.

Even if the Second Circuit's reading of the ATCA were not confirmed by two hundred years of judicial, legislative, and executive interpretation, the Court's holding is independently supported by the Torture Victim Protection Act of 1991. By passing the TVPA, Congress explicitly endorsed the construction of the Alien Tort Claims Act that has been adopted by the Second Circuit and federal courts around the country. The TVPA specifies that individuals like Petitioner, who subject individuals to torture and extrajudicial killing under the actual or apparent authority of a foreign nation, may be held liable for civil damages to their victims. 28 U.S.C. § 1350 note. This recent clear statement of congressional intent will provide an alternative basis for decision in most future cases of this type, further obviating any need to review the vague interpretive issues regarding the ATCA raised in Questions One and Two.

Finally, not one of the other questions presented by Petitioner is even remotely certworthy. As elaborated below, Questions Three through Seven involve issues not properly before this Court because they were not raised or decided below; the questions are fact-dependent and hence inappropriate subjects for interlocutory review, or are questions without substance because they are governed by prior controlling decisions of this Court.

Petitioner Karadžić is an indicted war criminal who has sponsored the most brutal campaign of "ethnic cleansing" in Europe since the Holocaust. He has ordered the murder, imprisonment,

rape and other torture of countless individuals like Respondents. Respondents filed this case more than three years ago. Petitioner presents no reason why this Court should expend its scarce resources to intervene, at this interlocutory stage, to further delay his trial and judgment.

STATEMENT

I. Background

Respondents in this case seek compensatory and punitive damages for genocide, war crimes, and crimes against humanity, including rape and other gross human rights violations, carried out by Bosnian-Serb forces under the command of Petitioner Radovan Karadžić.[1] Through a deliberate policy of "ethnic cleansing," Karadžić's forces attempted to eliminate Bosnian-Muslims from Serb-controlled areas of Bosnia-Herzegovina. Complaint ¶¶ 3, 17, Court of Appeals, Joint Appendix ("J.A.") at A8, A14. Their atrocities included rapes, forced pregnancies, castrations, and other forms of torture, and summary execution aimed at permanently altering the demography of Bosnia-Herzegovina. *Id.* ¶ 17, J.A. at A14.

The Serbs living in Bosnia-Herzegovina declared their independence in April 1992, shortly after Bosnia-Herzegovina, like Croatia and Slovenia before it, seceded from the Socialist Republic of Yugoslavia. The U.S. government did not recognize either the Bosnian-Serb government[2] or Karadžić's status

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[1] At all times relevant to the complaint, Karadžić was the commander of the Bosnian-Serb military forces and the self-proclaimed president of the *de facto* government of Srpska, the "state" purporting to represent Bosnian-Serbs living in Bosnia-Herzegovina. Complaint, ¶ 17, Court of Appeals, Joint Appendix ("J.A.") at A14; Pet. App. at A6, *Kadic v. Karadžić*, 70 F.3d 232, 237 (2d Cir. 1995).

On a motion to dismiss for lack of subject matter jurisdiction, the allegations of the complaint must be accepted as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[2] While Bosnia-Herzegovina has received international recognition, including by the United States, the self-proclaimed Bosnian-Serb government has not been recognized internationally by any state nor the United Nations. Complaint ¶ 15, J.A. at A13-14.

as "president" thereof (Complaint ¶ 15, J.A. at A13-14); nor has the U.S. government ever accorded him any form of head-of-state immunity. Dist. Ct. Op. at 7, J.A. at A284 (noting Karadžić's "lack of head-of-state immunity"); *id.* at 7 n.6, J.A. at A284 (citing letter from Department of State to Plaintiffs' counsel which states that Karadžić "enjoys no immunity from the jurisdiction of the courts of the United States," *see* J.A. at A141).

To further their claim to independence, the Bosnian-Serbs, led by Karadžić and aided by the government of the rump Yugoslavia, began to drive Bosnian-Muslims from self-proclaimed Bosnian- Serb territory. They employed a campaign of systematic, brutal violence to further their expansionist goals. Complaint ¶¶ 17-21, J.A. at A14-15. Hundreds of thousands of victims of "ethnic cleansing" were expelled from their homes and villages, rounded up and held in concentration camps, subjected to rape and other forms of torture, and deported and summarily executed—all because of their religion or nationality. *Id.* ¶¶ 3, 16, J.A. at A8-9, A14. At the time Respondents filed their complaint, governmental and independent observers estimated that between 50,000 and 120,000 people had been killed in the war, and over 2 million forced from their homes. *Id.* ¶ 16, J.A. at A14.

Petitioner Karadžić, the leader of the Bosnian-Serbs, ordered the policy of ethnic cleansing and its attendant human rights violations. *Id.* ¶¶ 3, 25-27, J.A. at A8-9, A16-17. Bosnian-Serb forces under his command and control deliberately and intentionally committed egregious violations of international human rights law and the laws of war, including genocide. *Id.*[3]

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[3] The U.S. government concluded that the Bosnian-Serb leadership intentionally employed killing and torture, including rape, to destroy the non-Serb population of Bosnia-Herzegovina. In 1993, for example, the State Department reported to Congress:

> On a scale and scope not seen for half a century, barbarous leaders consciously used atrocities of the most vile nature, including wholesale rape of women in Bosnia, to drive ethnic populations from their home.

(*footnote continued*)

Throughout their military campaign, the Bosnian Serbs were supported by the Yugoslav government and its army. *Id.* ¶¶ 6, 16, J.A. at A9, A11.

The atrocities committed against Respondents Jane Doe I and Jane Doe II are representative of those inflicted by Karadžić's forces. On May 31, 1992, while Jane Doe I was imprisoned in a Bosnian-Serb concentration camp, a group of Bosnian-Serb soldiers held her and five other young women at gunpoint, forced them to undress and began to rape them, several at a time. Jane Doe I was raped repeatedly, by at least eight soldiers. When she resisted, the soldiers hit her, and slashed her breasts with a knife. Two of the young women who were tortured with her disappeared and are presumed murdered. *Id.* ¶¶ 21-23, J.A. at A15-16.

Jane Doe II was living with her mother and younger brother in Bosnia-Herzegovina, when two Bosnian-Serb soldiers entered her home at about 4:00 in the morning. The soldiers soon began to beat her and her mother, then raped and murdered her mother. The murderer turned to Jane Doe II with a bloody knife and said that it was her turn. The two children managed to escape with the help of a neighbor. *Id.* ¶¶ 8, 24, J.A. at A11-12, A16.

II. Proceedings Below

On February 11, 1993, Respondents filed this suit as a class action, on behalf of Jane Does I and II and all women and men

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SEN. COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON FOREIGN AFFAIRS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, 103d Cong., 1st Sess. at xiii (Joint Committee Print 1993); *see also* U.S. Dep't of State, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992 721-25; U.S. Dep't of State, BOSNIA AND HERZEGOVINA HUMAN RIGHTS PRACTICES 3, 17 (1995).

U.N. investigations have reached the same conclusions. *See, e.g.*, U.N. Security Council, REPORT OF THE SECRETARY-GENERAL PURSUANT TO S.C.R. 808, S/25704 (1993) at ¶ 40, pp. 10-11; U.N. Comm'n on Human Rights, FIFTH PERIODIC REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE FORMER YUGOSLAVIA, U.N. Doc. E/CN.4/1994/47 (1993); RAPE AND ABUSE OF WOMEN IN THE AREAS OF ARMED CONFLICT IN THE FORMER YUGOSLAVIA, GA A/50/329 (1995).

who suffered rape, summary execution, other torture or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb military forces under the command and control of Petitioner Karadžić. Complaint ¶¶ 9-14, J.A. at A12-13. Respondents cited, *inter alia*, the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) ("ATCA" or "§ 1350"),[4] the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note (1994),[5] and the federal question provision, 28 U.S.C. § 1331 (1994).

Without notice to the parties or briefing or argument on the subject-matter jurisdiction issue, on September 7, 1994, the United States District Court for the Southern District of New York (Leisure, J.) dismissed Respondents' suit against Karadžić, ruling: (1) that acts of genocide, war crimes, and crimes against humanity do not violate the law of nations, so long as they are "committed by non-state actors," J.A. at A289; (2) that the Second Circuit's holding in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which found jurisdiction against official torturers under the ATCA, applies only to the conduct of officials of *recognized* governments, J.A. at A292; and (3) that the possibility that the United States government might, *at some point in the future*, formally recognize Karadžić's government, declare him a head of state, and suggest absolute immunity on his behalf somehow "militates against this Court exercising jurisdiction over the instant action," J.A. at A285.

Following oral argument on Respondents' appeal, the Court of Appeals called for the views of the United States government, which were presented to the Court by the Solicitor Gen-

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[4] The ATCA states: "The district courts shall have original jurisdiction of *any* civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

[5] The TVPA provides a cause of action for victims of torture or summary execution against any individual, regardless of nationality, who has committed such acts "under actual or apparent authority, or color of law, of any foreign nation . . . ." TVPA § 2(a), 28 U.S.C. § 1350 note.

eral and the State Department in a Statement of Interest of the United States filed on September 13, 1995 ("U.S. Statement of Interest," lodged with the Court as Exhibit A). In urging this Court to reverse the District Court's judgment, the United States Government supported Respondents' position in all key aspects. The Solicitor General argued that the Alien Tort Claims Act affords jurisdiction over violations of the law of nations committed by non-state actors; that Petitioner was not immune from suit while in the United States; and that dismissal under the political question doctrine was not warranted.

Relying on the plain language of the ATCA, as interpreted in the line of federal decisions beginning with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), the Court of Appeals unanimously reversed the District Court and upheld subject matter jurisdiction over Respondents' claims. The panel (Newman, C.J., Walker & Feinberg, JJ.) reversed and remanded to the District Court for further proceedings, ruling: (1) jurisdiction over violations of the law of nations under the Alien Tort Claims Act includes claims of genocide and war crimes committed by non-state actors, Pet. App. at A18-21, *Kadic v. Karadžić*, 70 F.3d 232, 242 (2d Cir. 1995); (2) a representative of an unrecognized state acts under color of law for the purposes of the Torture Victim Protection Act, Pet. App. at A24-27, 70 F.3d at 244-45; (3) service of the summons and complaint upon Petitioner while he was physically present in the United States conferred personal jurisdiction over him, Pet. App. at A30, 70 F.3d at 247 (citing *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990)); and (4) Petitioner was entitled to no statutory or common law grant of immunity from suit, Pet. App. at A31-34, 70 F.3d at 247-48.

Karadžić then petitioned for rehearing and rehearing en banc, citing, *inter alia*, a recent law review article which set forth a novel reinterpretation of the early history of the Alien Tort Claims Act.[6] In denying rehearing on February 4, 1996, the

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[6] *See* Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995). *See* discussion *infra* sec. I(C).

Second Circuit panel rejected this attempt to narrow the ATCA. The panel noted the broad language chosen by the drafters, and noted that Congress had codified a broad reading of the statute in 1992 when it enacted the Torture Victim Protection Act. The full Court of Appeals then denied rehearing en banc without dissent. Pet. App. at A42, *Kadic v. Karadžić*, 74 F.3d 377 (2d Cir. 1996).

On remand, the District Court held a status conference and issued an order on April 22, 1996, lodged as Exhibit C, which denied Petitioner's motions to dismiss for failure of service of process and to stay discovery pending this Court's decision on the petition for certiorari. The District Court ordered Petitioner to answer the complaint by May 22, 1996. Respondents are accordingly preparing to serve their discovery requests.

REASONS FOR DENYING THE WRIT

The writ should be denied because review of the Second Circuit's fact-specific decision would be premature and a waste of this Court's resources. Petitioner identifies no "compelling reasons" why the petition should be granted at this stage, *see* SUP. CT. R. 10, nor any issues on which the circuits are divided. To the contrary, all prudential considerations weigh against review of these questions. With the passage of the Torture Victim Protection Act in 1992, Congress expressly endorsed the Second Circuit's interpretation of the Alien Tort Claims Act. Most future cases will proceed under the new statute as well as the ATCA, thus diminishing the significance of the ATCA interpretation issues raised in Questions One and Two.

More fundamentally, the decision below was correct. The Second Circuit held, following the language of the Alien Tort Claims Act and a long line of circuit court precedent, that a federal district court may exercise original jurisdiction over a suit by an alien, for torts only, committed in violation of the law of nations. No clearer violations of the laws of nations could have occurred than those ordered by Petitioner Karadžić. The Second Circuit further held, following the precise words

of the TVPA, that individuals like Petitioner, who subject individuals to torture and extrajudicial killing under the actual or apparent authority of a foreign nation, may be held liable to their victims for civil damages. Petitioner offers no reason why these straightforward statutory readings are incorrect. Nor does Petitioner offer any reason why such important questions of federal law should be heard in the state, rather than the federal, courts.

Finally, none of the other questions raised by Petitioner is even remotely certworthy. All address issues which are either fact-specific, not fully passed on below, negated by assertions of the United States government before the Court of Appeals, or governed by clear holdings of this Court.

I. QUESTIONS ONE AND TWO ARE NOT CERTWORTHY.

A. Review is Premature: Petitioner seeks review of a unanimous interlocutory jurisdictional ruling, supported below by the Solicitor General and the State Department, which presents no extraordinary issue, and that simply remands for pretrial proceedings that are currently ongoing before the District Court. To interrupt these proceedings would ensnare this Court in fact-specific questions that ought not be reviewed absent a fuller factual record.

This Court grants petitions for certiorari "only for compelling reasons." SUP. CT. R. 10. Review of interlocutory orders is granted "sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). It would be pointless for this Court to grant certiorari to review a nonfinal order in a case in which full pretrial proceedings are ongoing, during which new facts and additional legal claims are being raised and decided, and where the facts developed at trial will substantially aid this Court's determination. As Justice Scalia recently noted: "We generally await final judgment in the lower courts before exercising our jurisdiction." *Virginia Military Institute v. United*

States, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari) (citations omitted). Granting certiorari now would improvidently force this Court into review of piecemeal litigation; denying certiorari, by contrast, will "import[ ] no expression of opinion upon the merits of [the] case," but rather ensure that the lower courts and, if need be, this Court, will ultimately review this case on a fully developed, rather than fragmented, record. *House v. Mayo*, 324 U.S. 42, 48 (1945); *Virginia Military Institute v. United States*, 508 U.S. at 946 (Scalia, J., concurring in denial of certiorari) (noting that denial of review "does not, of course, preclude [Petitioner] from raising the same issues in a later petition, after final judgment has been rendered" and full range of legal and factual issues has been determined at trial).

B. The Circuits Are Not Divided: Nor need the Court review the order to secure uniformity of decision, SUP. CT. R. 10, because no circuit split exists on the narrow questions here. The ATCA states:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. In 1980, the Second Circuit ruled in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) that § 1350 empowers a federal court to hear claims by aliens for torts in violation of fundamental norms of international law. In *Filártiga*, as here, plaintiffs sued for torture and other gross violations of fundamental human rights. The Second Circuit adopted the view urged by the United States Departments of Justice and State and unanimously held that ATCA jurisdiction is proper where aliens sue individuals for tortious injuries committed in violation of peremptory norms of customary international law. *Id.* at 878.

Since 1980, federal courts have consistently reaffirmed *Filártiga* and its underlying principle.[7] The *Filártiga* principle

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[7] Contrary to Petitioner's hopelessly confused discussion of sovereign immunity and the Alien Tort Claims Act, neither *Filártiga* nor

has been followed without variance by courts in the First,[8] Second,[9] Ninth,[10] and Eleventh Circuits.[11] The instant case squarely follows this governing precedent. The Second Circuit analyzed the law in the same manner as the courts in the above-cited

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the decision of the Second Circuit in this case conflicts with this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). *See* Pet. at 10-11, 17-18. In an action against a foreign state, *Amerada Hess* held that suits under the ATCA do not constitute exceptions to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1994) ("FSIA"). As this Court specified in *Amerada Hess*, the FSIA has no relevance to ATCA claims which do not involve foreign states as defendants:

> The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.

488 U.S. at 438. The case at hand, of course, was filed against an individual, not a foreign state.

[8] *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 178-83 (D. Mass. 1995); *Todd v. Panjaitan*, Civ. A. No. 92-12255 (PBS), 1994 WL 827111 (D. Mass. Oct. 26, 1994) (mem. op.).

[9] *See, e.g., Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989); *Cabiri v. Assasie-Gyimah*, No. 94 Civ. 3566 (AGS), 1996 WL 191733 (S.D.N.Y. Apr. 18, 1996); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996); *Aguinda v. Texaco*, No. 93-7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994).

[10] *See, e.g., Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472-76 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); *Trajano v. Marcos*, 978 F.2d 493, 498-503 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993); *Quiros de Rapaport v. Suarez-Mason*, No. C-87-2266 (JPV) (N.D. Cal. Apr. 11, 1989); *Martinez-Baca v. Suarez-Mason*, No. C-87-2057 (SC) (N.D. Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987), *on reconsideration on other grounds* 694 F. Supp. 707 (N.D. Cal. 1988). *See also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993).

[11] *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996); *Paul v. Avril*, 812 F. Supp. 207, 211-12 (S.D. Fla. 1993); *see also Linder v. Calero-Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992) (reversing dismissal of tort claim arising out of torture and execution of wounded non-combatant in violation of laws of war).

cases, applied the same interpretation of the scope of the Alien Tort Claims Act, and reached a jurisdictional determination that followed the holdings of each of those cases.

Contrary to Petitioner's claim, the decision below creates no split with the D.C. Circuit's rulings in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). In *Tel-Oren*, a sharply splintered panel (Edwards, Bork & Robb, JJ.) divided three ways in affirming the dismissal of a claim of terrorism brought under the ATCA against the Palestine Liberation Organization ("PLO"). Far from stating a crisp rule opposing *Filártiga*, the division in the panel made "it . . . impossible to say even what the law of this circuit is" with regard to the scope of the ATCA. *Tel-Oren*, 726 F.2d at 823 (Bork, J., concurring). In successfully urging this Court to deny certiorari, the Solicitor General noted:

> Neither the court of appeals' judgment order nor the reasoning set forth in the lengthy concurring opinions of the participating judges creates any clear conflict in the circuits. The only proposition for which the judgment below may fairly be read—that in the circumstances of this case, Petitioners have not alleged facts sufficient to support the district court's exercise of subject matter jurisdiction—does not conflict with the Second Circuit's decision in *Filártiga*.

U.S. Brief as *Amicus Curiae*, *Tel-Oren* at 7, 24 I.L.M. 427, 431 (1985). While one panel member, Judge Robb, failed even to reach the *Filártiga* question,

> Judges Edwards and Bork each took pains to point out that his reading of the Alien Tort Statute, if adopted by the panel, would not necessarily conflict with the decision of any other circuit, including the Second Circuit's decision in *Filártiga v. Peña- Irala*, *supra*.

Id. at 9-10 (citing Edwards, 726 F.2d at 790-91; Bork, 726 F.2d at 819-20).[12] Similarly, in the D.C. Circuit's decision in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (1985), then-Judge Scalia emphasized that "nothing in [this] decision necessarily conflicts with the decision of the Second Circuit in *Filártiga v. Peña-Irala*." *Sanchez-Espinoza*, 770 F.2d at 207 n.5.

Nor does the Second Circuit's ATCA holding with regard to nonstate actors in any way conflict with the D.C. Circuit's holdings in *Tel-Oren* or *Sanchez-Espinoza*. The panel below unanimously held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals" and hence may be raised in an ATCA suit against the head of an unrecognized state. Pet. App. at A12, 70 F.3d at 239. In *Tel-Oren*, Judges Edwards and Bork rejected ATCA jurisdiction over a claim of terrorism committed by the PLO, but both recognized that certain torts violate international law even when committed by private actors. Judge Edwards recognized a "handful of crimes to which the law of nations attributes individual responsibility," *Tel-Oren*, 726 F.2d at 795, and Judge Bork recognized that piracy—a crime which involves no state action[13]—falls within the original scope of the ATCA. *Id.* at 813-15. In this case, the

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[12] In particular, Judge Bork distinguished *Filártiga* as a case in which "the defendant was clearly the subject of international-law duties, the challenged actions were not attributed to a participant in American foreign relations, and the relevant international law principle was one whose definition was neither disputed nor politically sensitive." *Tel-Oren*, 726 F.2d at 820. Here, Karadžić is clearly the subject of international-law duties not to engage in genocide, war crimes, or crimes against humanity; his challenged actions cannot be attributed to a participant in American foreign relations; and the relevant international law principles are not ones whose definitions are disputed or politically sensitive. *See* Pet. App. at A13, 70 F.3d at 239-40 ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Claims Act for acts of genocide, war crimes, and other violations of international law."); *id.* at A16-22, 70 F.3d at 241-43 (defining each of those violations in detail).

[13] *See, e.g.*, *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (pirates act "without . . . any pretense of public authority.").

Second Circuit simply found that genocide and war crimes also constitute violations that may be committed by private actors. Pet. App. at A15-22, 70 F.3d at 241-43.[14] In so ruling, the Court of Appeals relied, *inter alia*, on express language in treaties that have been ratified by the United States forbidding even supposedly private acts of genocide and war crimes. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) ("persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials, *or private individuals*") (emphasis added); Geneva Convention (No. IV) Respecting the Laws & Customs of War on Land, 36 Stat. 2277 (entered into force Jan. 26, 1950) (applying laws of war to all "parties" to a conflict, including insurgent military groups).

Similarly, in *Sanchez-Espinoza*, a case filed against the U.S. government and the Nicaraguan *Contras*, then-Judge Scalia stated only that the law of nations did not reach "private, non-state conduct of *this sort*," *id.* at 206-07, which violates no treaty of the United States: namely, the private operation of "paramilitary training camps in the United States." *Id.* at 205 (emphasis added); *see also id.* at 206 ("We are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals."). As the U.S. Government stated to the Second Circuit in this case, the violations of international law alleged here (genocide, war crimes, and crimes against humanity) are "of a substantially different nature" than those in *Sanchez-Espinoza*. U.S. Statement of Interest at 14 (lodged as Exhibit A). Indeed, in *Sanchez-Espinoza* itself, then-Judge Scalia explicitly acknowledged that

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[14] Judges Bork and Edwards both also found that the defendant in *Tel-Oren*, the Palestine Liberation Organization, did not meet the international definition of a state. *Tel-Oren*, 726 F.2d at 791 (Edwards, J.); *Tel-Oren*, 726 F.2d at 803-04 (Bork, J.) By contrast, the *de facto* regime headed by Petitioner meets that definition. *See* Pet. App. at A26, 70 F.3d at 245. Individuals acting on behalf of a *de facto* state act "under color of law" for the purposes of international law. *See infra* notes 32-34 and accompanying text.

the Alien Tort Claims Act might cover "private, nongovernmental acts *that are contrary to treaty or the law of nations*—the most prominent examples being piracy and assaults on ambassadors." *Sanchez-Espinoza*, 770 F.2d at 206 (emphasis added).

C. The Unanimous Decision of the Court of Appeals is Correct: With respect to the Alien Tort Claims Act (Questions One and Two), the Second Circuit held only, following the precise words of the statute, that a federal district court may exercise original jurisdiction over a suit by an alien, for torts only, committed in violation of the law of nations. Applying the now well-accepted analysis dictated by *Filártiga* and its progeny, the Second Circuit found that these aliens had alleged violations of fundamental norms of international law, and thus properly triggered jurisdiction under that statute.

In so holding, the Second Circuit merely ruled that the ATCA means what it says: when an alien brings a suit for torts in violation of the customary law of nations or treaties of the United States, the federal court properly asserts jurisdiction under 28 U.S.C. § 1350. As this Court "has stated time and again, . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). While the extent of the actionable violations under the ATCA may be a lingering point of academic debate, this essential teaching is accepted in every court that has ruled on the matter, including Judge Bork in *Tel-Oren* and the D.C. Circuit in *Sanchez-Espinoza*.

No clearer violation of the laws of nations could have occurred than the brutal acts of genocide, rape and other torture, and summary execution ordered by Petitioner Karadžić. Whether or not one might challenge the application of the ATCA to less heinous international acts, the crimes alleged here—including genocide, war crimes, and crimes against humanity—are universal in nature and violate international law whether committed by private individuals or officials of

unrecognized states, thus bringing them within the scope of the ATCA.[15]

Genocide is perhaps the most egregious abuse known to humanity,[16] while the prohibition against war crimes forms a fundamental tenet of the law of nations.[17] Petitioner Karadžić's responsibility for these egregious international law violations has been confirmed repeatedly by both U.S. and international sources. As the Second Circuit recognized:

> [T]he injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadžić and carried out by the military forces under his command.

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[15] The United States' *amicus* brief in *Filártiga* outlined the types of human rights claims over which U.S. courts could properly assert jurisdiction under § 1350:

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection.

U.S. Brief as *Amicus Curiae*, *Filártiga* at 20, 19 I.L.M. 585, 603 (1980). Where, as in this case, a court finds such an international consensus and wide understanding, the court is obligated to exercise jurisdiction under § 1350.

[16] The International Court of Justice described genocide as:

> involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and . . . which is contrary to moral law and the spirit and aims of the United Nations.

Reservations to the Convention on Genocide Case, 1951 I.C.J. 15, 23 (Advisory Opinion). *See also Barcelona Traction Light & Power Co.* (Belgium v. Spain), 1970 I.C.J. 4, 32 (holding genocide, slavery, and acts of aggression "obligations *erga omnes* [against everyone]").

[17] Fifty years ago, this Court reviewed a pattern of wartime abuses strikingly similar to those alleged in this case, and held that such acts "are recognized in international law as violations of the law of war." *Application of Yamashita*, 327 U.S. 1, 14 (1946). The Court specifically found that the laws of war are part of the law of nations. *Id.* at 7.

Pet. App. at A6, 70 F.3d at 237. As early as December 1992, then-U.S. Secretary of State Lawrence S. Eagleburger publicly named Karadžić as one of a small group of "individuals suspected of war crimes and crimes against humanity."[18] These suspicions were confirmed on July 24, 1995, when the International Criminal Tribunal for the Former Yugoslavia ("International Tribunal") filed a 16-count indictment against Petitioner Karadžić, charging him with genocide, crimes against humanity, and grave breaches of the laws or customs of war.[19]

Where, as here, the defendant has committed torts that violate obligatory, definable, and universal norms of international law, the judicial, legislative, and executive branches all agree that the victims may invoke the jurisdiction of the Alien Tort Claims Act. As the circuit and district courts have recognized,[20] the first Congress enacted the ATCA as part of the First Judiciary Act of 1789. In so doing, Congress recognized that torts in violation of the law of nations were transitory torts, for which a tortfeasor could be sued wherever he might be found. Congress enacted the ATCA to encourage the resolution of such suits in federal, rather than state court, when they raise important questions of international law. *See generally* Edwin D. Dickinson, *The Law of Nations as Part of the National Law*

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[18] 3 U.S. DEP'T OF STATE DISPATCH 52, 1992 WL 3118358 (Dec. 28, 1992) (Statement at international conference on the former Yugoslavia, Geneva, Switzerland, December 16, 1992).

[19] The indictment was subsequently confirmed by judicial order. The Tribunal's indictment, lodged with the Court as Exhibit B, confirms the fundamental point presented by Respondents: regardless of whether Karadžić is characterized as a private person, the leader of a *de facto* regime, or a person acting under color of the law of Yugoslavia, he is individually responsible for his crimes in violation of the law of nations, and thus capable of committing torts in violation of the law of nations actionable under both the ATCA and the TVPA. *See* Indictment, The Prosecutor of the Tribunal against Radovan Karadžić and Ratko Mladić, Case No. IT-95-5-I, Int'l Crim. Trib. – Yugo. (July 24, 1995) (lodged with the Court as Exhibit B).

[20] *See supra* cases cited in notes 8-11.

of the United States (pts. 1 & 2), 101 U. PA. L. REV. 26, 792 (1952). Indeed, these concerns led Alexander Hamilton to argue forcefully for federal jurisdiction over all cases involving aliens:

> So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

THE FEDERALIST No. 80, at 477 (Alexander Hamilton) (C. Rossiter ed., 1961).[21] The Framers were also motivated by a fear that state courts might be unsympathetic to aliens and that the denial of justice to an alien in a state court might embroil the United States in an unwanted dispute with a foreign nation.[22]

The ATCA was Congress' response to this concern.[23] This Court has accordingly described the ATCA as one of several

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[21] *See also* THE FEDERALIST No. 3, at 43 (John Jay) (C. Rossiter ed., 1961); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 530-36 (James Madison) (J. Elliot ed., 1836); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988).

[22] Commentators who have studied the legislative history of the First Judiciary Act, and particularly that of the ATCA, overwhelmingly conclude that section 1350 "was intended to avoid local bias in aliens' suits and to obtain uniform judicial interpretation and application of the law in cases implicating international concerns." Andrew M. Scoble, Note, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 132-33 (1986). *See also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); D'Amato, *supra* note 21; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 11-31 (1985).

[23] Scholars have traced the origins of the ATCA to a 1781 Resolution of the Continental Congress. *See* Burley, *supra* note 22, at 477; William Casto, *The Federal Courts' Protective Jurisdiction Over Torts*

statutes "reflecting a concern for uniformity in this country's dealings with foreign nations and . . . a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). The *Filártiga* approach to subject matter jurisdiction under 28 U.S.C. § 1350 honors this design, and has therefore been adopted by the Second, Ninth, and Eleventh Circuits, as well as by every district court that has considered the question.

More than two hundred years ago, the Attorney General agreed that "there can be no doubt that" aliens injured by transitory torts committed in violation of the law of nations—the ransacking and plundering of a British colony—"have a remedy by a civil suit in the courts of the United States" under § 1350. 1 OP. ATT'Y GEN. 57, 59 (1795) (emphasis omitted). Since then Executive Branch practice has consistently supported this interpretation of the ATCA.[24] *See, e.g.*, 26 OP. ATT'Y GEN. 250, 253 (1907) (when aliens sue for damages caused in Mexico by American company, ATCA "provide[s] a forum and a right of action," if acts complained of violate law

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Committed in Violation of the Law of Nations, 18 CONN. L. REV. 467, 490-91 (1986); Dodge, *supra* note 22, at 226-29. At that time, Congress urged the states to authorize suits for damages by parties injured by infringements on the rights of ambassadors, violations of safe-conducts, infractions of treaties, and other "offenses against the law of nations, not contained in the foregoing enumeration." Dodge, *supra* note 22, at 227 (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 1136-37 (Library of Congress, 1912)). In 1789, the ATCA shifted jurisdiction over such claims to the federal courts, after a particularly embarrassing international incident (the "Marbois affair") was handled in state courts. Casto, *supra*, at 491-94; Dodge, *supra* note 22, at 229-31; Randall, *supra* note 22, at 24-26. Adopting the broad sweep of the earlier resolution, the original version of the ATCA provided district courts with jurisdiction over "*all* causes where an alien sues for a tort only in violation of the law of nations . . . ." Judiciary Act ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

[24] For reviews of this history, see Casto, *supra* note 23, at 502-05; D'Amato, *supra* note 21, at 66-67; *Tel-Oren*, 726 F.2d at 780 (Edwards, J., concurring).

of nations). In *Filártiga*, the U.S. government reaffirmed that longstanding interpretation in an *amicus curiae* memorandum signed by the State Department Legal Adviser and the current Solicitor General, arguing that "in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts." *See* U.S. Brief as *Amicus Curiae* in *Filártiga* at 19, 19 I.L.M. 585, 603 (1980). The Government's Statement of Interest below applied *Filártiga* as the "starting point for the necessary analysis" of the ATCA, U.S. Statement of Interest at 2 (lodged as Exhibit A), and confirmed that "the law of nations can indeed be violated by non-state acts of genocide, war crimes and crimes against humanity." *Id.* at 14. The Solicitor General thus concluded that "the district court erred in dismissing all of plaintiffs' claims on the ground that Karadžić is not a state actor and therefore is not subject to the law of nations governing such conduct." *Id.*

Any doubt as to whether *Filártiga* presents the correct interpretation of the Alien Tort Claims Act was eliminated in 1992 when Congress enacted the Torture Victim Protection Act, which not only endorses and codifies the *Filártiga* approach, but also provides a specific cause of action for individuals, like Respondents, who have suffered torture and summary execution. *See, e.g.*, *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) ("The TVPA codifies the holding in *Filártiga* . . . ."). As the House Report made clear, in enacting the TVPA, Congress strongly approved the reading of the ATCA presented by *Filártiga* and its progeny:

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." Section 1350 has other important uses and should not be replaced. . . . .

> . . . [C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered b[y] section 1350. *That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.*

HOUSE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT, H.R. REP. NO. 367, 102d Cong., 1st Sess. 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (emphasis added).[25]

In sum, Petitioner's claims about the ATCA are entirely rebutted by the great weight of judicial, legislative, and executive opinion. Every court which has considered the ATCA has concluded that it was designed to reach international offenses of a particularly "heinous" character. Piracy, the paradigmatic international law offense for which the statute granted federal court jurisdiction in the late 18th century, was among the most egregious offenses known to humanity, one which rendered its perpetrators "*hostis humani generis*," enemies of all mankind. *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844). In

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[25] In claiming that the Second Circuit's approach somehow conflicts with Judge Bork's concurring opinion in *Tel-Oren*, Petitioner completely ignores the fact that it was written years before the TVPA was enacted. In *Tel-Oren*, Judge Bork suggested that the ATCA be given a narrow reading "unless a modern statute . . . provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement. Then, at least, we would have a current political judgment about the role appropriate for courts in an area of considerable international sensitivity." *Tel-Oren*, 726 F.2d at 816; *id.*, 726 F.2d at 822 (suggesting the need for "an act of Congress"). The enactment in 1992 of the TVPA provides clear evidence of the congressional desire to have these disputes litigated in U.S. courts. Indeed, the legislative history of the TVPA specifically notes that Congress passed the statute to respond to Judge Bork's questioning of the existence of a private right of action under the ATCA. *See* H. REP. NO. 367 at 4; SENATE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT, S. REP. NO. 249, 102d Cong., 1st Sess. 4 (1991); 137 CONG. REC. S1378 (daily ed. Jan. 31, 1991) (statement of Sen. Specter, sponsor of the TVPA) (stating that TVPA responds to concerns raised in *Tel-Oren*).

the modern era, genocide, war crimes, and crimes against humanity unquestionably fall within the same shameful category. If piracy and attacks on diplomats meet this standard, then surely, so does genocide—recognized since the Holocaust as international law's most serious violation.

Against this background, Petitioner now asks this Court to reverse the Second Circuit's ruling on a ground first raised below on his petition for rehearing. During oral argument, Petitioner argued that *Filártiga* and its progeny did not extend Alien Tort jurisdiction over defendants who are nonstate actors. Yet on rehearing, relying on a single law review article, Petitioner shifted ground and launched a broad challenge to the entire *Filártiga* line of precedent, arguing that history somehow suggests that the First Congress intended jurisdiction under the ATCA to be limited to prize cases. Pet. at 14 (citing Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995)).[26]

The panel correctly rejected that claim, noting that the law review article was "far from conclusive," and that regardless of how the ATCA may have been construed in 1789, that reading had been superseded by Congress' codification of the *Filártiga* approach in the TVPA and the *Filártiga* court's reading of the statutory term "the law of nations" to mean "international law not as it was in 1789, but as it has evolved and exists among

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[26] Petitioner miscites two other articles in support of his argument. Pet. at 14. One affirmatively supports application of the ATCA to a broad range of international law violations, David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 55 (1995) (calling such use of the ATCA "unexceptional"), while the other questions the *process* by which the content of international law is determined, not the assertion of jurisdiction over such cases under the ATCA, Alfred P. Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 18 FLETCHER FORUM OF WORLD AFF. 65, 75 (1994) ("There can be little doubt that normal American rules of jurisdiction permit aliens to bring tort actions in courts of the United States with regard to injuries done them by the acts of other aliens abroad.").

the nations of the world today." Pet. App. at A44, 74 F.3d at 378 (citing *Filártiga*, 630 F.2d at 881.)[27]

In fact, Petitioner's newly minted historical argument not only ignores the extensive historical evidence of the ATCA's origin and purpose, discussed above, but also its plain meaning and governing rules of statutory interpretation. Following Professor Sweeney, Petitioner would now read the word "tort" in the ATCA as referring exclusively to " 'wrongs' under the law of prize." Sweeney, *supra* note 6, at 475. Yet if this were its intent, Congress could have drafted the statute to confer federal court jurisdiction "only for civil actions by an alien for a *wrong under the law of prize.*" As this Court observed skeptically in *Amerada Hess*, 488 U.S. at 436-37, the "Alien Tort Statute makes no mention of prize jurisdiction." Instead, Congress chose much broader language, authorizing the federal courts to hear "*any* civil action by an alien for a tort only," so long as it was "committed in violation of the law of nations or a treaty of the United States" 28 U.S.C. § 1350 (emphasis added). Even in 1789, the term "tort" was commonly understood to have a much broader meaning than prize-related wrongs. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *117 (torts include "actions for trespasses, nusances [sic], assaults, defamatory words and the like").[28] Moreover, as Professor Dodge has demonstrated, the First Congress clearly understood that a variety of torts, not just those arising from prize cases, could violate the law of nations. *See* Dodge, *supra* note 22, at 232-33. Indeed, to accept Petitioner's reading of the ATCA as limited to prize cases would render the statute redundant, since the district courts already had jurisdiction over those very cases under their admiralty and maritime jurisdiction. Dodge, *supra* note

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27 "With a broad reading of the Alien Tort Act settled as the law of this Circuit and codified by Congress as recently as 1991, we decline the invitation to limit the Act to the one category of torts that arguably prompted its enactment." Pet. App. at A44, 74 F.3d at 378.

28 By contrast, even Professor Sweeney, on whose article Petitioner relies, acknowledges that "the word 'tort' was seldom used" in prize cases. Sweeney, *supra* note 6, at 475.

22, at 246-51.[29] Finally, as the Second Circuit panel noted, even assuming *arguendo* that torts committed in prize cases somehow prompted passage of the ATCA, "it does not follow that the statute should be confined" in the present-day to such torts, any more than 42 U.S.C. § 1983 jurisdiction should now be limited to those constitutional violations that existed in 1871, the year that statute was passed.[30] Pet. App. at A43-44, 74 F.3d at 378.

This Court should decline Petitioner's invitation to disrupt a well-settled line of circuit precedent, endorsed by two hundred years of executive branch opinion and recently reaffirmed by a modern Congress, based on an incorrect law review article whose analysis has in any event been wholly superseded by modern legislative enactment.

II. QUESTIONS THREE THROUGH SEVEN ARE NOT CERTWORTHY

A. Question Three (whether Petitioner is liable under the Torture Victim Protection Act) is not certworthy, because the Second Circuit found the TVPA applicable on two alternative grounds, one of which is a straightforward application of the TVPA which Petitioner does not challenge. In addition, both

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[29] The article cited by Petitioner unduly stresses the drafters' use of the words "tort only" in the ATCA, while ignoring Congress' broad directive that the federal courts hear "*any* civil action" that meets the jurisdictional prerequisites. But as Professors Randall and Casto have suggested, the word "only" confirms the statute's limitation to tort actions, in order to prevent British creditors from using the ATCA as a means to assert their contract and property claims in federal court. Casto, *supra* note 23, at 507-08; Randall, *supra* note 22, at 28-31. *See also* Dodge, *supra* note 22, at 255 (arguing "only" limited remedies available to British plaintiffs challenging property confiscations).

[30] *See, e.g., Monroe v. Pape*, 365 U.S. 167, 183 (1960) ("Although the legislation [§ 1983] was enacted because of the conditions that existed in the South at the time, it is cast in general language and is as applicable to [other States] as it is to the States whose names were mentioned over and again in debates.").

grounds are fact-bound and hence inappropriate for interlocutory review.

The TVPA affords a cause of action for torture and summary execution committed "under actual or apparent authority, or color of law, of any foreign nation." § 2(a), 28 U.S.C. § 1350 note. The Second Circuit found that Respondents had met this requirement in two ways: first with their allegation that Petitioner acted under color of law of the recognized state of Yugoslavia, Pet. App. at A26, 70 F.3d at 245; and second with their allegation that Petitioner had acted under color of law of "Srpska," the unrecognized state of which he claims to be president. *Id.* at A25-26, 70 F.3d at 244-45. The latter holding as to unrecognized states was not necessary to the resolution of the TVPA question. Thus, even if this Court were to grant the petition and reverse on this issue, the Second Circuit would likely reinstate its decision based on Respondents' allegation that Petitioner had acted under color of law of Yugoslavia, an unexceptional application of the TVPA, and a fact-based issue not appropriate for interlocutory review.[31]

Furthermore, the Second Circuit decision as to the liability of representatives of unrecognized governments under the TVPA is clearly correct. State action does not require action by a recognized government.[32] Where, as here, the regime at issue

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[31] The TVPA's legislative history directs that "Courts should look to 42 U.S.C. Sec. 1983 in construing 'color of law' and agency law in construing 'actual or apparent authority.' " TVPA, H.R. REP. NO. 367, 102d Cong., 1st Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. Under 42 U.S.C. § 1983, it has long been held that action taken by private parties in concert with state actors or with significant state aid is actionable. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

[32] The Court of Appeals noted: "Our courts have regularly given effect to the 'state' action of unrecognized states." Pet. App. at A25, 70 F.3d at 244-45 (citing *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-03 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9-12 (1868) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971) (post-World War II East Germany)).

meets the definition of a state under international law, it is bound by international law whether or not it has been formally recognized by other governments.[33] As the Executive Branch stated in its submission to the Second Circuit:

> [W]hen the perpetrators of human rights violations are, as here, in control of territory and exercise authorities of a governmental character, they may be held accountable under international law even though the regime on whose behalf they act is not recognized and does not satisfy the requirements for independent statehood.

U.S. Statement of Interest at 5-6 n.3 (lodged as Exhibit A). *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986) §§ 201, 202, 702 [hereinafter RESTATEMENT (THIRD)].

Indeed, the opposite conclusion would have had potentially grave unintended consequences. Had the Court below ruled that the words "foreign nation" in the TVPA did not apply to unrecognized *de facto* states, such as North Korea, Taiwan, or Srpska, its ruling would have exempted officials of those states from liability under the act, a perverse result given the punitive purpose behind "withholding recognition." Moreover, numerous other federal statutes prohibit or regulate various kinds of transactions with "foreign nations."[34] To read that language to

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[33] In one example of such individual liability for actions taken on behalf of unrecognized regimes, a Confederate commander was tried for violations of the law of nations, though he had not served a recognized or legitimate state. U.S. Statement of Interest at 10 (lodged as Exhibit A) (citing *Trial of Henry Wirz*, H.R. EXEC. DOC. NO. 23, 40th Cong., 2d Sess. 3-5 (1867)).

[34] *See, e.g.*, 15 U.S.C. § 12(a) (1994) (antitrust measure defining "Commerce" as trade between any territory of the United States and any "State, Territory, or foreign nation"); 15 U.S.C. § 61 (1994) (regulating trade involving export of goods to "any foreign nation"); 18 U.S.C. § 793(a) (1994) (prohibiting transmission of defense information to "any foreign nation"); 18 U.S.C. § 1030(a) (1994) (prohibiting the acquisition of computer data for the purpose of providing an "advantage [to] any foreign nation"); 42 U.S.C. § 2274(a)-2277 (1994) (prohibiting transmission of restricted data to "any foreign nation").

exclude unrecognized states would have carved away or endangered large chunks of previously exercised federal jurisdiction.

B. Question Four (whether the case presents a nonjusticiable political question) is both fact-specific and insubstantial, given that this case involves a straightforward question of statutory interpretation and that the U.S. government has unambiguously favored the exercise of federal jurisdiction under the relevant statutes. "The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991). In *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986), this Court declared that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Accord Baker v. Carr*, 369 U.S. 186, 217 (1962) ("The doctrine . . . is one of 'political questions,' not one of 'political cases.' "). "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them," without a broad, judicially-created "exception for cases and controversies that may embarrass foreign governments" or subject foreign conduct to judicial examination. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990) (Scalia, J.).

Further, no foreign policy or political question concerns obtain here, because the U.S. government has unambiguously favored assertion of federal jurisdiction. Congress has directed the courts to entertain suits under both the ATCA and the TVPA, and the Executive Branch has endorsed the judicial decision of this particular case.[35] Holding Karadžić liable for

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35 "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, *this is not one of them*." U.S. Statement of Interest at 3 (lodged as Exhibit A) (emphasis added).

civil damages is fully consistent with the U.S. government position regarding his criminal accountability before the International Tribunal set up by the U.N. Security Council to prosecute violations of international violations committed in the former Yugoslavia.[36] Civil action in U.S. courts is also expressly authorized by the International Tribunal.[37] Thus, in this case, the federal courts are performing a task assigned to them by Congress, with the full support of the Executive Branch, that is fully consistent with the international enforcement scheme established by the U.N. Security Council.

C. Question Five (whether Petitioner was immune from suit while visiting the United Nations) borders on frivolous, given that both the United Nations and the U.S. government agree that no immunity applies. Petitioner Karadžić indisputably falls into none of the narrow categories of U.N. visitors entitled to immunity under the U.N. Headquarters Agreement.[38] The State Department asserted shortly after this lawsuit was filed that Petitioner's status "has been solely as an 'invitee' of the United Nations, and as such he enjoys no immunity from the juris-

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[36] *See* U.S. Statement of Interest at 7-8 (lodged as Exhibit A).

[37] The rules of the Tribunal expressly assign to national courts the task of conducting civil procedures to obtain compensation for victims of human rights abuses. Rules of Procedure and Evidence, Rule 106(B) ("Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation."), U.N. Doc. IT/32 (1994), *amended by* U.N. Doc. IT/32/Rev.1 (1994), U.N. Doc. IT/32/Rev.2 (1994), U.N. Doc. IT/32/Rev.3 (1995), *reprinted in* 5 Criminal Law Forum 651, 688 (1994).

[38] The Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted in* 22 U.S.C. § 287 note (1988), provides immunity for certain representatives of U.N. member nations, *id.* § 15, and bars service of process within the well-defined "headquarters district" without the consent of the Secretary-General, *id.* § 9(a). Neither provision applies to Petitioner. *See* District Court's April 22, 1996 Memorandum Order denying Petitioner's motion to dismiss for insufficient service of process at 1-2 (lodged with the Court as Exhibit C) (Petitioner was properly served outside the U.N. Headquarters District).

diction of the courts of the United States." Habib Letter, J.A. at A141. The U.S. government repeated this position in its Statement of Interest before the Second Circuit.[39] Finally, where, as here, immunity is governed by a precisely-worded agreement between the U.S. government and an international agency, the courts ought not manufacture an unprecedented common law immunity against suit.

D. Question Six (whether personal jurisdiction over Karadžić was properly obtained by personal service on him while he was physically present within the judicial district) is entirely foreclosed by this Court's unanimous holding in *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990). "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." *Id.* 495 U.S. at 610 (Scalia, J.). Having been properly served within New York State while physically present in the forum, Petitioner has undeniably subjected himself to the jurisdiction of the federal courts sitting in that state.

E. Finally, **Question Seven** (whether this suit should be dismissed on *forum non conveniens*) is not properly before this Court, because Petitioner has not yet even raised the issue below by a FED. R. CIV. P. 12(b)(3) motion. In any event, such a motion is fact-dependent and cannot be considered by this Court absent a prior motion, findings of fact below, and a decision by the district court considering all relevant public and private interest factors. *See Piper Aircraft v. Reyno*, 454 U.S. 235, 237 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . . ."). Moreover, even if Petitioner had made such a motion, this Court's controlling precedent plainly demands that Peti-

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[39] U.S. Statement of Interest at 2-3 (lodged as Exhibit A). The U.N. Legal Counsel has concurred in the conclusion that U.N. invitees are not immune from suit in U.S. courts. *In re Galvao*, [1963] U.N. Jur. Y.B. 164; *see also* RESTATEMENT (THIRD) § 469 (U.N. invitees not immune from suit or legal process while in the United States).

tioner also carry the burden of demonstrating the existence of an adequate and available alternative forum. *Id.*, 454 U.S. at 241. Not only has he failed to introduce any evidence that such a forum exists, he is unlikely to be able to do so, given the Second Circuit's recognition "that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiff's claims." Pet. App. at A39, 70 F.3d at 250.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
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(4)

No. 95-1599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADZIC,

Petitioner,

vs.

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Respondents,

and

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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EDITOR'S NOTE

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Preliminary Statement

This brief is being submitted by petitioner in reply to briefs in opposition by respondents in Kadic and Doe and an amicus brief in support of respondents.[1]

Introduction

Respondents ignore or minimize the compelling reasons for certiorari review of Kadic failing to see the case promises a species of litigation that Congress surely would not countenance, that the courts of the United States could not handle, that threatens vital functions of the United Nations and that would be disruptive of world order and the rule of law among nations.

Respondents argue that Kadic accords with views recently reaffirmed by a modern Congress, see e.g. Doe at 24. Petitioner disagrees, see e.g. Pet. 12-13. But the briefs read together unmistakably show a welter of pertinent statutes many recently enacted in piecemeal fashion. There is a compelling need to parse these statutes to clarify how the law now stands, 20 years after Judge Edwards in Tel-Oren called upon this Court for clarification, and to provide a much needed framework to guide the future exercise of federal jurisdiction and the shape of future Congressional enactments.

Two circumstances in combination give this case extraordinary dimension. Not only does it have no nexus with the United States, it has been pressed from the outset and is now being pressed in the midst of an on-going volatile enormously important international crisis fraught with grave risk.

It is fatuous to speak of this case as a simple tort action. The case itself is a burning political question. It impinges now and has at all times since it was filed had a

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[1] References beginning with "Kadic," "Doe" and "Amicus" are to pages of their briefs.

bearing on matters of highest priority for the United States and the world -- matters of peace and war, and life and death, with the potential of engulfing the Balkans and beyond.

I. Kadic Is A Dangerous Global Extension Of U.S. Judicial Power Fully Ripe For Review

Respondents cite Mushikiwabo v. Bazayagwiza, No. 94 Civ. 3627(JSM), 1996 WL 164496, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1996), RA1, attached, as a heartening example of the feasibility and constructive impact of Kadic. To the contrary, Mushikiwabo is a bad omen of the litigation Kadic promises.

In Mushikiwabo, on the strength of Kadic, the Court ordered entry of default judgments totalling over $100,000,000 to five individual plaintiffs against a former political party leader in Rwanda, not a government official, said to have "played an instrumental role in the torture and massacre of thousands of Rwanda's Tutsi minority, as well as moderate numbers of the Hutu majority." Id. Plaintiffs were relatives of plaintiffs killed in the massacre. No nexus with the United States appears except that two plaintiffs were U.S. citizens. Service of process was made upon defendant while in New York to attend a session of the United Nations. He did not appear in the action other than to write a letter claiming immunity which the Court rejected, citing Kadic. RA4.

Five hundred thousand, or more, die in Rwanda and five chance plaintiffs receive a judgment in the U.S. for the sum of $100,000,000 -- an amount unimaginable and uncollectible and absurd from the standpoint of Rwandan law and economics -- and call it justice, or the American dream for the poor of the world. See also, Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass. 1995), in which multi -million dollar default judgments for compensatory and punitive damages were awarded to plaintiffs, expatriate citizens of Guatemala, against defendant, a former Minister of Defense of Guatemala for devastating injuries they suffered from conduct of Guatemalan military forces, including numerous acts of gruesome violence

inflicted in Guatemala by military personnel under defendant's direct command.

Cases such as Mushikiwabo and Xuncax demonstrate concretely what common sense beholds at every turn. As stressed in the petition, this case cannot be feasibly litigated, see e.g. Pet. at 18-20. The courts of the U.S. cannot adjudicate the rights and remedy the wrongs sustained by tens of thousands of people in hostilities that have taken place thousands of miles away, having no connection with the U.S. The case is ripe for review now on the issues fulsomely addressed by the Court of Appeals. Respondents' arguments that review is premature and that this Court would be wise to wait for a full record, see e.g. Kadic at 3-5, Doe at 9-10, Amicus at 4-6, in reality reflect the hope that defendant will default, or provide a political forum for dramatic rhetoric about another world, with a meaningless, uncollectible award of millions, or billions.

II. There Is A Compelling Need For This Court To Clarify The Issues Of Congressional Intent This Case Presents With Respect To The Exercise Of Civil Jurisdiction By U.S. Courts In Cases Of Torture, Terrorism And Other Horrific Conduct Throughout The World

The petition and opposing briefs advocate opposing views of Congressional intent bearing on the issues presented by Kadic which will not be repeated here.

The point to be made in this reply, is that respondents ignore the importance of the need to determine Congressional power and intent in deciding whether to give an expansive reading to statutes governing the exercise of federal courts' jurisdiction in this vast and difficult area. No nation can claim such universal jurisdiction absent a clearly defined and detailed international agreement or fully developed common law. For one important example, neither respondents nor amicus so much as mention the concern properly expressed in Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C.Cir. 1994),

cert denied, 115 S.Ct. 923, 130 L.Ed.2d 803 (1995) for judicial caution in the absence of clearly expressed Congressional intent, Pet. at 21-22.

Nor do respondents appreciate the overriding significance that Amerada Hess gives to Congressional intent and the concept that the Congressional intent behind a statute such as the Foreign Sovereign Immunities Act can impact directly to limit the reach of the Alien Tort Statute without doing so in hac verba. Amerada Hess has an important bearing here because it rejected an expansive reading of the Alien Tort Statute, 28 U.S.C. §1350 ("ATS"), by the Second Circuit, the progenitor of Filartiga and now Kadic, i.e. the erroneous view that the ATS could serve as an independent source of federal court jurisdiction over foreign states, notwithstanding the enactment of the FSIA.

The petition and briefs of the parties show that there is a welter of statutes enacted piecemeal, some very recently, which demonstrate efforts by Congress to calibrate the jurisdiction of federal courts in this area of civil litigation. For example, anti-terrorist legislation just enacted provides jurisdiction for civil actions in U.S. courts against nations by victims of terrorism. But it requires as a prerequisite that the nations must have been declared terrorist states by the United States, that the plaintiff victims must be nationals of the United States and must have afforded the nation an opportunity to arbitrate. See, Section 221(a), Jurisdiction for lawsuits against terrorist states, PL. 104-132 (S1735); 110 Stat. 1214, 1241, Antiterrorism and Effective Death Penalty Act of 1996, April 24, 1996.

For purposes of assessing this case's certworthiness what matters as much if not more than whether petitioner is right in maintaining that Congress would be appalled at the exercise of jurisdiction by U.S. courts condoned in the present case, or whether respondents and amicus are correct in their praise, is that there is a great and urgent need to reconcile, harmonize and order the existing welter of statues that seek to calibrate jurisdiction with the seeming generality of the Alien

Tort Statute.

Three points need to be made in specific reply to respondents' arguments:

1. Respondents overstate the support that can be gleaned from the two Attorneys' General opinions they cite, see Doe at 19-20, see also 24. 1 Op. Atty. Gen. 57 (1795), addressed acts of hostility committed abroad by American citizens. 26 Op. Atty. Gen. 250 (1907) concerned damages caused in Mexico by an American company. They do not support the exercise of jurisdiction by U.S. courts in the absence of any U.S. nexus, the jurisdiction approved in Kadic.

2. Respondents repeatedly suggest that petitioner has acknowledged jurisdiction and a sufficient claim under the Torture Victim Protection Act. See e.g. Kadic at 3, Amicus at 5. This is incorrect. Petitioner has maintained throughout this case that the TVPA is inapplicable because it is limited to acts done "under actual or apparent authority, or color of law, of any foreign nation," and requires exhaustion. See e.g. Pet. Question 3 at i, and at 10, 12.

As is stated in the petition at p. 10, Judge Leisure's rejection of the TVPA as a basis for his jurisdiction was correct. A59-62. Far from codifying the ATS in the way respondents claim, the TVPA strongly supports the conclusion drawn by the District Court -- that the ATS like the TVPA is limited to state action. There is no state action here.

3. Respondents attack petitioner for the "false" assertion, Kadic at 5, that respondents had failed to plead that no courts were available "in their homeland." Petitioner made no such assertion, stating only that the Court of Appeals erroneously decided the issue without "submissions" from the parties. This was the position of the District Court. Petition, A62, n. 14.

III. Kadic Poses An Unacceptable Threat To Vital U.N. Functions

In arguing against the immunity to which petitioner claims entitlement under federal common law. See Petition Point III at 27-30, respondents make a new argument -- that the grant of immunity to petitioner would be an unwarranted intrusion into U.N. affairs. Kadic, p. 13.

Respondents reach this conclusion by pointing to the silence of the U.N. as evidence the U.N. thinks this case should go forward. Kadic, id. at n. 11. But the Court of Appeals invited the United States to comment and did not invite comments from the U.N. The U.N. Legal Advisor had heretofore said there would be immunity, see Pet. 28-29, pointing also to the functional immunity for U.N. activities held to be necessary in Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 51-52 (2d Cir. 1991).

If any inference can be drawn from the U.N.'s silence, the most likely is that this case is too politically sensitive for it to comment. This case may well also be too sensitive politically for this Court to place much reliance on the views expressed by the United States on justiciability and political questions, particularly because the case bears directly upon the jurisdiction of the federal courts, a core concern of the judicial branch, while the substantive issues of law and jurisdiction it presents are peripheral to the primary foreign policy concerns of the Executive Branch.

There can be no doubt of the threat this case poses to U.N. functioning. It is irrational to think that the U.N. wants participants in high level negotiations to be deterred from attending urgent talks at its U.N. Headquarters in New York by the threat of being subjected to legal process.

Petitioner was urged to come to the U.N. at the specific and pointed requests of officials such as U.N. Secretary General Boutros Boutros Ghali and President Clinton. The crucially important functions the U.N. serves will be severely

impaired by the rule in Kadic which broadcasts that persons like petitioner who come to the United Nations as he did for a specific vital purpose by so doing subject themselves to the jurisdiction of U.S. courts over events thousands of miles away having no nexus with the United States and which would otherwise clearly not be cognizable here. U.N. invitees urgently summoned to work on matters of highest priority should receive at the very least the same protection that is extended to litigants and participants in federal, state and local governmental affairs.

Conclusion

This Court should review and resolve now the issues of fundamental and farreaching importance this case presents. The decision below is wrong in an area of direct judicial concern that is rife with confusion. The petition for certiorari should be granted.

Dated: New York, New York
May 25, 1996

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

April 9, 1996, FILED

----------x

LOUISE MUSHIKIWABO, et al.,

Plaintiffs,

-v-

94 Civ. 3627 (JSM)

JEAN BOSCO BARAYAGWIZA,

Defendant.

MEMORANDUM OPINION AND ORDER

----------x

JOHN S. MARTIN, Jr., District Judge:

Presently before the Court is a motion for a default judgment in which the plaintiffs have overwhelmingly established that the defendant has engaged in conduct so inhuman that it is difficult to conceive of any civil remedy which can begin to compensate the plaintiffs for their loss or adequately express society's outrage at the defendant's actions.

The evidence presented by the plaintiffs establishes that the defendant, Jean Bosco Barayagwiza, was one of the political leaders in Rwanda who played an instrumental role in the torture and massacre of thousands of Rwanda's Tutsi minority, as well as moderate members of the Hutu majority. Each of the plaintiffs is related to individuals who died in that massacre.

Although not himself a government official, Barayagwiza was a leader of the Rwandan Hutu political party known as the Coalition pour la Defense de la Republique (the "CDR"). The CDR had its own militia which operated in

conjunction with Rwandan government forces in carrying out a plan aimed at the extermination of Rwanda's Tutsi population. Barayagwiza was also the owner and a Board member of radio station RTLM, which encouraged the violence against the Tutsi by broadcasting messages of hate stating that the Tutsi were "the enemy," "traitors," and "deserved to die."

The Court will not detail here all of the acts of torture and murder that were carried out according to the plan of the defendant and his coconspirators, which have been extensively documented in the affidavits submitted in support of this motion. It is enough to note that a United Nations Commission of Independent Experts concluded that "[since] 6 April 1994 an estimated 500,000 unarmed civilians have been murdered in Rwanda. That estimate may indeed err on the conservative side for ... some reliable estimates put the number of dead at close to 1 Million."

Each of the plaintiffs has submitted a declaration documenting the massacre of a number of relatives that resulted from the campaign of genocide orchestrated by the defendant and his coconspirators. For example, plaintiff Faustin Semuhungu describes how CDR militia shot down the door of his parents home, hacked his parents to death with machetes and shot two of his brothers to death. Two other brothers were summarily executed, one along with his wife and three children ages four years, two years, and two months. Plaintiff Semuhungu lost a total of thirty-eight relatives in the massacres.

The Court credits each of the plaintiff's declarations and finds that the facts set forth therein occurred as a result of the actions of the defendant and his coconspirators. Therefore, each of the plaintiffs has established a factual basis for the claims asserted against the defendant. Plaintiffs seek compensatory and punitive damages under the Alien Tort Act, 28 U.S.C. @ 1350, the Torture Victim Protection Act of 1991, Pub.L.No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C.A. @ 1350 note, and the Rwandan Civil Code.

In light of the recent opinion of the Second Circuit in Kadic v. Karadzic 70 F.3d 232 (2d Cir. 1995), there can be no doubt that this Court has jurisdiction to hear these claims and that defendant is legally liable for the damages that the plaintiffs have suffered as a result of the massacre that he orchestrated. In Kadic, the Second Circuit held that acts of genocide, similar to those documented here, are actionable under the Alien Tort Act (the "ATA"), whether or not committed by a state. 70 F.3d at 241-42. Although the court in Kadic held that "torture and summary execution -- when not perpetrated in the course of genocide or war crimes -- are proscribed by international law only when committed by state officials or under color of law," id. at 243, the affidavits submitted here clearly establish that the defendant's actions were part of a coordinated, genocidal effort with officials of the Rwandan government and thus defendant both acted in pursuit of genocide and under color of law. See id. at 245 (under @ 1983 standards applicable to state action requirement of Alien Tort Act, "[a] private individual acts under color of law within the meaning of section @ 1983 when he acts together with state officials or with significant state aid"). Since defendant and his coconspirators acted under color of law, their conduct is also actionable under the Torture Victim Protection Act (the "TVPA") Id. at 245 ("By its plain language, the [TVPA] renders liable those individuals who have committed torture or extrajudicial killing 'under actual or apparent authority, or color of law, of any foreign nation'").[1] Plaintiffs have fulfilled the exhaustion requirement of the TVPA by demonstrating that the Rwandan judicial system is

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[1] Plaintiffs Louis Rutare and Rangira Beatrice Gallimore, who are citizens of the United States and thus cannot base their claims on the ATA, state claims under the TVPA. Although the TVPA does not itself confer jurisdiction, the Court has subject matter jurisdiction over the TVPA claims under 28 U.S.C. @ 1331, the general federal question jurisdiction statute. See Kadic at 246 (citing Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D.Mass. 1995)).

virtually inoperative and will be unable to deal with civil claims in the near future. See TVPA @ 2(b) (plaintiff must "exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred"); see also Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D.Mass. 1995). Plaintiffs have also submitted expert testimony establishing that they have claims against the defendant under the laws of Rwanda. The Court has supplemental jurisdiction over these municipal tort claims pursuant to 28 U.S.C. @ 1367.

Although the defendant has not officially appeared in this action, he did send a letter claiming that he is immune from suit because he was served with the summons and complaint while in this country to attend a session of the United Nations. A similar argument was rejected by the Second Circuit in Kadic. 70 F.3d at 246-48. In any event, the current Government of Rwanda, in a diplomatic note dated March 17, 1995, officially waived any claim of immunity that the defendant might assert. Therefore, the defendant is subject to the personal jurisdiction of this Court.

Having found that the Court has jurisdiction over the defendant and that plaintiffs have established the causes of action alleged in the complaint, the issue remaining is the amount of damages to be awarded. This Judge has seen no other case in which monetary damages were so inadequate to compensate the plaintiffs for the injuries caused by a defendant. One can not place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs.

Plaintiffs' able counsel have carefully documented the lost earnings and pain and suffering damages of each of the plaintiffs' relatives and the emotional damages of each of the plaintiffs, and the Court is prepared to adopt those calculations in all but the following respects. Plaintiffs seek pain and suffering damages in the amount of $ 1.5 million dollars for each relative. Since in almost all cases the actual killing took

place in a brief period of time, the amount sought appears to be excessive under our traditional principles for an award of pain and suffering damages. Therefore, the award for pain and suffering damages will be calculated at $ 500,000 per relative. However, each plaintiff is entitled to an award of punitive damages which the Court concludes should include an amount of $1,000,000 per relative victim, in addition to the $5,000,000 for each plaintiff that has been requested. Thus, although the basis for the award is not as requested, the Court concludes that it is appropriate to enter judgment against the defendant on behalf of each plaintiff in the amounts requested. Therefore the plaintiffs are awarded judgment in the following amounts:

Louise Mushikiwabo	$ 35,204,577
Louis Rutare	10,736,227
Rangira Beatrice Gallimore	16,746,291
Julie Mukandinda Mugemanshuro	20,215,869
Faustin Semuhungu	22,364,970

SO ORDERED.

JOHN S. MARTIN, JR., U.S.D.J.

Dated: New York, New York
April 8, 1996

(5)

No. 95-1599

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADŽIĆ,

Petitioner,

—vs.—

S. KADIC, JANE DOE I, and JANE DOE II, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS DAVID J. BEDERMAN, ERWIN CHEMERINSKY, WILLIAM DODGE, MARTHA FIELD, BURKE MARSHALL, JUDITH RESNIK, DAVID L. SHAPIRO, AND WILLIAM W. VAN ALSTYNE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae David J. Bederman, Erwin Chemerinsky, William Dodge, Martha Field, Burke Marshall, Judith Resnik, David L. Shapiro, and William W. Van Alstyne are professors of federal jurisdiction or international law who have followed developments under the Alien Tort Claims Act since the decision of the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). We file this brief with the consent of all parties.

While we do not hold uniform views about all aspects of the ATCA and the cases construing it, we believe that the federal courts have applied the statute in a rigorous manner that has yielded generally consistent results. In particular, we do not believe that the cases under the ATCA have disturbed the overall fabric of federal jurisdiction. As a consequence, we do not believe that the carefully reasoned decision of the Court of Appeals here, which is consistent with the rigorous approach of earlier decisions, warrants review, particularly given the prospect that the course of proceedings on plaintiffs' claims under the Torture Victim Protection Act will make it unnecessary to decide the ATCA issues petitioner raises. We therefore urge the Court to let the decision stand.

STATEMENT OF THE CASE

Plaintiffs-respondents filed related actions in the United States District Court for the Southern District of New York. Alleging acts of genocide, war crimes, torture, extrajudicial killing, and other violations of fundamental human rights committed by forces in the former Yugoslavia under the command and control of petitioner Radovan Karadžić, Pet. App. 46, plaintiffs asserted claims, among others, under the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), and the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992),

reprinted at 28 U.S.C.A. § 1350 (West 1993) (note following) ("TVPA"). Petitioner was personally served with the summonses and complaints during two separate visits to New York City in early 1993. Pet. App. 49-50.

On May 10, 1993, petitioner moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process, and nonjusticiability. Pet. App. 46-47. On September 7, 1994, after receiving briefing on only the service and personal jurisdiction issues, the District Court granted petitioner's motion to dismiss for lack of subject matter jurisdiction on the ground that the Alien Tort Claims Act did not reach petitioner's acts because he was not an official of any recognized state. Pet. App. 58-59; 866 F. Supp. 734 (S.D.N.Y. 1994).

On October 13, 1995, the United States Court of Appeals for the Second Circuit reversed. Pet. App. 5; 70 F.3d 232 (2d Cir. 1995). The Court held that plaintiffs' allegations of genocide and war crimes stated violations of customary international law actionable under the ATCA regardless of petitioner's status as a state actor. Pet. App. 16-22. The Court also held that the customary international law offenses of torture and summary execution did include a state action requirement. Pet. App. 22-23. Accordingly, the Court of Appeals held, petitioner would be liable under the ATCA for acts of torture and summary execution without regard to state involvement to the extent those acts were committed in pursuit of genocide or war crimes, and liable under the statute on claims of torture and summary execution on proof of state action. Pet. App. 23.

The Court of Appeals next held that the customary international law of human rights applies to states without distinction between recognized and unrecognized states, and that as a result, plaintiffs' allegations entitled them to prove either that

petitioner's regime satisfied the criteria for a state, or that he acted under color of law of Yugoslavia. Pet. App. 25-26. Finally, the Court held that plaintiffs' allegations of torture and summary execution stated claims under the Torture Victim Protection Act, which would require them to prove, among other things, that petitioner acted with official authority or under color of law. Pet. App. 26-28.[1]

On January 6, 1996, with a brief opinion, the Court of Appeals denied a petition for rehearing. Pet. App. 44; 74 F.3d 377 (2d Cir. 1996). This petition for a writ of certiorari followed.

ARGUMENT

Petitioner purports to present to this Court a series of broadly cast questions going to the foundation and scope of the ATCA. Pet. i-ii. Petitioner's sweeping language boils down, however, to two basic assertions: first, that the decision below fundamentally conflicts with other federal courts' treatment of the statute; and second, that the decision gives the statute unprecedented and unjustifiable reach.

As an initial matter, even if the decision below presented questions under the ATCA that in other circumstances might

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[1] Although the District Court had ruled only on subject matter jurisdiction, the parties also briefed issues of service, personal jurisdiction, and justiciability under the political question doctrine. The Court of Appeals held that (a) personal service on petitioner outside of the U.N. headquarters district effectively subjected him to personal jurisdiction by the District Court, Pet. App. 30; (b) petitioner could not claim immunity under either the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted* at 22 U.S.C. § 287 note (1988), or federal common law, Pet. App. 31-34; and (c) the "politically charged context" in which the cases arose did "not transform them into cases involving nonjusticiable political questions," Pet. App. 35-39. *Amici* do not address any of these holdings, except to note that none appears to warrant this Court's review.

warrant this Court's review, the Court should deny the petition here. The multiple claims asserted by plaintiffs and the alternative basis of jurisdiction and liability provided by the TVPA make this case particularly unsuited for review at this early, pretrial stage, as the course of proceedings may well eliminate each of the issues under the ATCA petitioner asks this Court to decide.

In any event, neither of petitioner's basic assertions has merit. *First*, the federal courts have interpreted the ATCA in a consistent, restrained manner, and Congress endorsed their approach when it enacted the TVPA in 1992. Indeed, it appears that petitioner himself did not contest in the Court of Appeals many of the issues he seeks to raise now. On the principal issue addressed by the Court of Appeals -- state action as a component of various offenses under the customary international law of human rights – petitioner can point to no divergence of views warranting this Court's intervention. *Second*, the reading given these statutes by the Court of Appeals below and other federal courts does not render these statutes anomalous exercises of federal jurisdiction. To the contrary, these laws comport with a wide variety of other federal statutes by which Congress has exercised its authority, consistent with international law, to prescribe and adjudicate conduct occurring abroad.

I.

PLAINTIFFS' ALTERNATIVE RELIANCE ON THE TVPA MAKES REVIEW OF THIS CASE AT THIS STAGE PREMATURE.

First and foremost, the petition should be denied because, in light of the plaintiffs' alternative reliance on the TVPA and the unchallenged holdings of the Court of Appeals as to state action, the future course of proceedings could easily render moot each of the ATCA issues petitioner raises.

First, the TVPA and 28 U.S.C. § 1331 provide an undisputed basis of jurisdiction on which plaintiffs' entire case may go forward. It is undisputed that section 1331 confers federal jurisdiction over an action under the TVPA. *E.g.*, Pet. App. 28. It is also undisputed that the TVPA provides a federal cause of action against any individual who "under actual or apparent authority, or under color of law of any foreign nation" commits torture or extrajudicial killing. TVPA § 2(a). Giving full effect to the statutory requirement, the Court of Appeals held that plaintiffs here would need to show state action in order to prevail on their claims of torture and extrajudicial killing, Pet. App. 22-23, a result with which petitioner obviously does not take issue.

The Court of Appeals also explained how plaintiffs might meet the state action requirement. Pet. App. 24-26. It first set forth the showing plaintiffs would need to make in order to prove that the Republic of Srpska qualified as an unrecognized, de facto state under international law. *Id.* 24-26. Petitioner raises no issue as to that portion of the Court's analysis. The Court of Appeals then explained that, alternatively, plaintiffs could show that petitioner acted "under color of law" by acting in concert with state officials of Yugoslavia. *Id.* 26. In finding instructive the "color of law" requirement of 42 U.S.C. § 1983, the Court of Appeals adopted the same standard that petitioner urges here. *Compare* Pet. App. 26 (citing § 1983 and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)), *with* Pet. 12 (citing § 1983 and *NCAA v. Tarkanian*, 488 U.S. 179 (1988)).

Hence, at this point, there is no dispute that plaintiffs have stated a claim under the TVPA for which section 1331 provides jurisdiction. In light of that uncontested basis of jurisdiction, plaintiffs should also be permitted, under principles of supplemental jurisdiction, 28 U.S.C. § 1367, and without regard to the ATCA, to pursue any other causes of action properly arising under either international law or the applicable municipal law of tort.

Second, because the District Court dismissed these actions on the pleadings, plaintiffs have had no opportunity to prove either that the entity of which petitioner is an official qualifies as a state, or that petitioner acted under color of law of Yugoslavia, which clearly qualifies as a state. Should plaintiffs show state action by either of these routes in accord with the standards set forth by the Court of Appeals, they will be able to pursue their claims of torture and extrajudicial killing. As the Court of Appeals noted, the conduct alleged to constitute genocide and war crimes may also qualify as torture and extrajudicial killing, Pet. App. 23, particularly where, as here, plaintiffs allege that petitioner and his forces used acts of rape, forced impregnation, physical abuse, and murder to pursue their genocidal campaign. Hence, plaintiffs may be able to prove liability for the wrongful acts alleged without relying on their claims of genocide and war crimes, which would render moot petitioner's argument that those offenses include a state action component.

In order to ensure the informed consideration of issues that a full record facilitates, this Court generally refrains from reviewing decisions arising at an early, pretrial stage. This sound policy applies with special force in this case, where the development of a full evidentiary record on plaintiffs' several claims would so clearly sharpen and possibly eliminate the issues petitioner attempts to raise.

Third, the pattern of multiple claims and alternative bases of jurisdiction presented here may well prove characteristic of international human rights cases in the post-TVPA era. *See Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996). Thus, the same factors counseling denial here will likely diminish the significance of ATCA issues in other cases.

In short, review at this stage could easily have no effect on the actual outcome in this case and little or no effect in others. That prospect alone warrants denying the petition.

II.

PETITIONER HAS IDENTIFIED NO ISSUE UNDER THE ATCA WARRANTING REVIEW.

Petitioner raises no issue concerning the ATCA that warrants a grant of certiorari in this case. As an initial matter, the case plainly does not provide a suitable vehicle to decide the several issues concerning the ATCA that petitioner did not properly raise in the Court of Appeals but nevertheless seeks to present here. Given the consistent approach taken by the federal courts to claims under the statute for international human rights violations, and Congress's endorsement of that approach, there would be no reason for the Court to review any of those issues even had petitioner properly raised them. On the one substantive issue addressed below -- whether state action is a component of genocide and war crimes -- the decision of the Court of Appeals is in complete accord with other federal courts, the views of the United States, and authoritative international law sources.

A. The Federal Courts Have Consistently Applied the ATCA.

The ATCA was enacted by the First Congress as part of the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (1993)). It provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Id. While the ATCA has generated a substantial amount of historical investigation[2] and academic commentary, [3]the federal courts have had little, if any, difficulty actually applying it to allegations, like those here, of violations of human rights norms recognized as fundamental under international law.

First, the three Courts of Appeals that have now addressed the issue have each held that the ATCA both confers jurisdiction and recognizes a right to sue by private parties alleging international human rights violations. Pet. App. 9-10; *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474-75 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1996).[4] Indeed, petitioner conceded in the Court of

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[2] *Compare* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221 (1996) (historical origins support liberal construction of ATCA), *and* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467 (1986) (same), *with* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995) (historical origins support restrictive interpretation).

[3] *E.g.*, Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 Yale J. Int'l L. 65 (1995); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989).

[4] *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776-77 (D.C. Cir. 1985) (Edwards, J., concurring); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v.Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) ("*Forti I*"); 26 Op. Att'y Gen. 250, 252 (1907) (ATCA "provide[s] a right of action and a forum" for private tort suit over treaty violation); 1 Op. Att'y Gen. 57, 59 (1795) (victims of piracy "have a remedy by civil suit in the courts of the United States; jurisdiction being expressly given to these courts" by the ATCA).

Appeals that the ATCA provides a cause of action, advising the Court of Appeals that "Congress directly addressed the matter of civil remedies and created two express causes of action . . . under both § 1350 and the TVPA." Appellee's Brief (March 17, 1995) 27.[5]

Congress erased all doubt about the effect of the ATCA to authorize suit when it enacted the Torture Victim Protection Act of 1991, which codifies the cause of action by aliens for official torture or extrajudicial killing and extends the right to sue to citizens. Both the House and Senate Reports expressly evince Congress's understanding that a "remedy" for such offenses was "already available" to aliens under the ATCA. H. REP. NO. 367 (I), 102D CONG., 1ST SESS. 1991, 1992 U.S.C.C.A.N. 84, 86

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[5] Then-Judge Bork took a contrary view in his 1984 concurrence in *Tel-Oren*. While he acknowledged that the ATCA might be read to reflect "Congress' recognition (as opposed to creation)" of a right to sue, 726 F.2d at 811, he ultimately concluded that suit would lie only if international law both set forth the substantive norm and provided the procedural vehicle for its vindication. *Id.* at 816. Judge Bork did not attempt to square that position with his acknowledgment that the Congress that enacted the ATCA did intend to authorize suit for at least certain law-of-nations offenses, including violations of safe-conducts, the rights of ambassadors, and the laws of piracy, *id.* at 813-14; nor did he identify the sources of international law that, in his view, provided a cause of action for such violations, *compare id.* at 813-16 & nn. 22-23 *with id.* at 778-79 (Edwards, J., concurring). Apart from the district court decision in *Tel-Oren*, which did not command a majority in the Court of Appeals for the ground of its judgment, the only other reported decisions suggesting a view consistent with Judge Bork's are two district court decisions granting motions to dismiss on the ground that plaintiff was not an alien, but then pointing to the purported absence of a cause of action as, at best, an alternative holding, in discussions that confuse the relevance of the issue. *See Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 347 (S.D. Tex. 1989) (relying on *Filartiga* to identify conduct actionable under ATCA); *Tannenbaum v. Rabin*, No. CV-95-4537, 1996 WL 75283, at * 5 (E.D.N.Y. Feb. 13, 1996) (apparently relying on district court decision in *Tel-Oren* as support for dismissal for lack of alienage).

(Nov. 25, 1991) (hereinafter HOUSE REPORT); S. REP. NO. 249, 102D CONG., 1ST SESS., 1991 WL 258662 (Leg. Hist.) at 4 (Nov. 26, 1991) (hereinafter SENATE REPORT). Further, the legislative history emphasizes that the ATCA "should *remain* intact to *permit suits* based on other norms that already exist or may ripen in the future into rules of customary international law." HOUSE REPORT at 86 (emphasis added); *see also* SENATE REPORT 1991 WL 258662 at 4-5.

The explicit views of a subsequent Congress as to the enactments of an earlier one are entitled to significant weight, particularly where, as petitioner suggests is the case here, the intent of the enacting Congress is hard to discern. *See, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Congress's express confirmation that the ATCA provides a civil "remedy" by " permit[ting] suits" based on substantive international law norms provides additional reason to respect the federal courts' identical conclusion.

Second, the courts applying the ATCA have allowed its express language to determine its scope. Specifically, as Congress directed, the statute has been limited to suits by aliens. At the same time, the federal courts have refused invitations, such as petitioner's here, Pet. 17, to read into the statute territorial restrictions that Congress did not impose. *See, e.g., Trajano v. Marcos*, 978 F.2d 493, 500 (9th Cir. 1992), *cert. denied* 508 U.S. 972 (1993); *Paul*, 812 F. Supp. at 211.

Third, courts applying the ATCA have agreed that customary international law provides the substantive norms of conduct defining the tort. *See, e.g., Hilao*, 25 F.3d at 1475; *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425-26 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir.

1980); *Xuncax*, 886 F. Supp. at 184-85; *see also Tel-Oren*, 726 F.2d at 781-82 (Edwards, J., concurring); *id.* at 820-21 (Bork, J., concurring). It follows that a court must apply the customary international law that governed the defendant's conduct at the time the defendant acted. *See Filartiga*, 630 F.2d at 881. A court could hardly do otherwise, as customary international law is, by definition, an evolving body of law. *The Paquete Habana*, 175 U.S. 677, 694 (1900). Moreover, Congress has expressly endorsed that approach. HOUSE REPORT at 86 (ATCA "should remain intact to permit suits based on other norms that already exist *or may ripen in the future into rules of customary international law*") (emphasis added)).

Fourth, the federal courts have been rigorous in limiting the ATCA's reach to "specific, universal and obligatory" norms of customary international law of human rights. *Hilao*, 25 F.3d at 1475; *see* Pet. App. 10 (ATCA reaches only conduct that violates "well-established, universally recognized norms of international law" (citation omitted)); *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring). Specifically, federal courts have held that crimes such as official torture, summary execution, causing the disappearance of persons taken into custody, and prolonged arbitrary detentions are actionable under the statute, while free speech violations, negligence, and fraud are not.[6] No court has

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[6] *Compare Abebe-Jira*, 72 F.3d 844 (official torture and cruel, inhuman, and degrading treatment actionable); *Hilao*, 25 F.3d at 1475 (official torture, summary execution, and disappearance of arrestees actionable); *Filartiga*, 630 F.2d at 884-85 (official torture actionable); *Mushikiwabo v. Barayagwiza*, 1996 WL 164496, at *2 (genocide, torture, and summary execution actionable); *Xuncax*, 886 F. Supp. at 184-87 (torture, summary execution, disappearance, arbitrary detention, and certain cruel, inhuman, and degrading treatment actionable); *Paul*, 812 F. Supp. at 211-12 (torture and arbitrary detention actionable); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709-10 (N.D. Cal. 1988) (continued...)

ever suggested that the offenses alleged here -- genocide, torture, war crimes, and crimes against humanity -- do not fall within the scope of the ATCA. *See, e.g., Mushikiwabo v. Barayagwiza*, 1996 WL 164496, at *2 (genocide actionable).[7]

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[6] (...continued)
("*Forti II*") (disappearance actionable); *Forti I*, 672 F. Supp. at 1541-42 (torture, prolonged arbitrary detention, and summary execution actionable); *and Martinez-Baca v. Suarez-Mason*, No. 87-2057 (SC) (N.D. Cal. Apr. 22, 1988) (torture, prolonged arbitrary detention, and cruel, inhuman and degrading treatment actionable), *with Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (fraud, breach of fiduciary duty, or misappropriation of funds not actionable) *cert. denied*, 116 S. Ct. 709 (1996); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670-71 (S.D.N.Y. 1991) (shipping hazardous wastes not actionable); *and Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (free speech violations not actionable).

[7] Petitioner waited until his petition for rehearing to raise any question about the decision in *Filartiga*, having discussed the case during the principal briefing only to support his argument that the ATCA should be limited to "non-state action." Appellee's Br. 18-19. When petitioner did challenge *Filartiga*, he relied on a recently published law review article to argue, as he does here, that Congress intended the statute to apply only to actions under the law of prize. *See* Pet. 14 (citing Sweeney, note 2 above); Petition for Rehearing (Nov. 15, 1995) 3. *But see* Dodge, note 2 above (criticizing Professor Sweeney's thesis as historically and legally unsound). It would be difficult, at a minimum, for a federal court to adopt Professor Sweeney's historical hypothesis in the face of the general rule that statutes be read to mean what they say, *e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); the consistent judicial interpretation of the statutory language, *e.g., Holder v. Hall*, 114 S. Ct. 2581, 2629 (1994) (separate opinion of Blackmun, Stevens, Souter, and Ginsburg, JJ.); and the endorsement of that interpretation by a subsequent Congress, *e.g., Seatrain Shipbuilding*, 444 U.S. at 596. In any event, a single law review article does not provide an occasion for granting certiorari, particularly when its thesis has not been adopted -- or, with the exception of the decision below on rehearing, as yet even considered -- by any lower court.

B. The Federal Courts Are In Accord On The State Action Issues Petitioner Raises.

Prior to the petition for rehearing, the sole ATCA-related ground on which petitioner sought to defend the District Court's judgment was his argument that the statute did not confer subject matter jurisdiction over claims based on "non-state action." Appellee's Br. 19; *see id.* 18-26. Hence, the Court of Appeals decided two questions as to the scope of the Alien Tort Act:

> whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; [and,] if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action.

Pet. App. 5. The Court of Appeals answered both questions affirmatively, Pet. App. 16-22, and then set forth the standards by which plaintiffs-respondents might establish state action as to those offenses, such as torture and summary execution, that require it, *id.* at 22-26. None of these rulings merits review by this Court.

Courts applying the ATCA have uniformly recognized that certain acts, such as torture, murder, prolonged arbitrary detention, and causing a person's disappearance, do not implicate the law of nations absent official sanction, sponsorship, or involvement. *E.g., Trajano*, 978 F.2d at 500 (torture); *Sanchez-Espinoza*, 770 F.2d at 205-07 (torture and summary execution, among others); *Filartiga*, 630 F.2d at 889 (torture); *Xuncax*, 886 F. Supp. at 184-85 (torture, summary execution, disappearance, and arbitrary detention); *Forti II*, 694 F. Supp. at 709-11 (disappearance); *Forti I*, 672 F. Supp. at 1541-42 (torture, murder, and prolonged arbitrary detention); *see also Tel-Oren*, 726 F.2d at 794-95 (Edwards, J., concurring) (torture). Relevant international law authorities are to the same effect. *See, e.g.*, Convention

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, SENATE TREATY DOC. No. 20, 100th Cong., 2d Sess., 23 I.L.M. 1027 (1984), 24 I.L.M. 535 (1985) (requiring that pain or suffering be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" in order to constitute violation). In accord with these authorities, the Court of Appeals held that plaintiffs' claims of torture and summary execution required a showing of state action. Pet. App. 22-23; *see* Part I above.

The authorities are equally consistent, however, in recognizing that other norms of customary international law apply to individuals as private persons, without regard to state involvement. As the United States advised the Court of Appeals, "non-state actors may be responsible for violations of international humanitarian law, depending upon the character of the individual claim." Statement of Interest of the United States (September 13, 1995) 6. Indeed, in *Sanchez-Espinoza*, the case upon which petitioner principally relies, the Court of Appeals for the District of Columbia Circuit expressly stated that certain "private, nongovernmental acts . . . are contrary to treaty or the law of nations -- the most prominent examples being piracy and assaults upon ambassadors." 770 F.2d at 206. *See also Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring) (piracy and slave trading).

The Court of Appeals held here that genocide and certain war crimes are among the law-of-nations offenses reached by the ATCA that do not require a showing of state action. Pet. App. 16-22. Aside from the District Court below, no court has held to the contrary. The holding of the Court of Appeals comports with the views of the United States, which unequivocally stated to the Court of Appeals that "the law of nations can indeed be violated by non-state acts of genocide, war crimes, and crimes against humanity." U.S. Statement of Interest 14. It also comports with

authoritative international law sources. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, art. IV, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, *entered into force* for United States Feb. 23, 1989 ("Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"); Pet. App. 20-21 & n.7 (common article 3 of Geneva Conventions). Petitioner cites no authority of any kind to the contrary.

Finally, in light of its holding that plaintiffs would need to show state action to prevail on their claims of torture and summary execution, the Court of Appeals explained how that requirement might be met. Pet. App. 24-26. Petitioner does not take issue with the standards laid down by the Court of Appeals. *See* Part I above.

In short, as to both the applicability and content of the state action requirement under customary international law, the holdings of the Court of Appeals below comport with other federal decisions, the views of the United States, and authoritative international law sources. There is no reason for this Court to review those holdings.

III.

THE ATCA AND ITS APPLICATION BELOW COMPORT WITH ESTABLISHED PRINCIPLES OF FEDERAL JURISDICTION.

Contrary to Petitioner's contention, Pet. 16, the holding of the Court of Appeals that the ATCA applies to conduct committed beyond U.S. borders by a private citizen of a foreign state is neither "unprecedented" nor "breathtaking." The ATCA follows a long line of statutes that apply to conduct and persons beyond this country's borders. Against this background, the application of the ATCA to the conduct at issue here is fully consistent with accepted principles of federal jurisdiction and international law.

From the earliest days of the Republic, Congress has used U.S. law, both civil and criminal, to regulate persons and conduct beyond U.S. borders. As early as 1790, Congress used criminal sanctions to punish piracy on the high seas, regardless of the nationality of the perpetrator or the victim. Law of April 30, 1790, ch. 9, § 8, 1 Stat. 112 (1790) (criminalizing piracy on the high seas) (presently codified at 18 U.S.C. § 1651); *see also United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (applying 1819 criminal prohibition against piracy). Congress has also provided criminal remedies for torture, hostage taking, aircraft piracy, certain transactions involving nuclear materials, and the murder of diplomats, regardless of the place of the crime or the nationality of the victim or the perpetrator.[8]

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[8] *See* 18 U.S.C. § 2340A(b)(2) (torture); 18 U.S.C. § 1203(b)(1)(B) (hostage taking); 18 U.S.C. § 1116(c) (murder of foreign officials and diplomats); 18 U.S.C. § 831(c)(3) (prohibited transactions involving nuclear materials); 49 U.S.C. § 46502(b)(1) (aircraft piracy); *cf.* 18 U.S.C. § 2332 (international terrorism where U.S. national is killed).

Civil remedies for extraterritorial wrongs also have long been part of federal law. In 1819, Congress provided for civil seizure of ships used for piracy, without regard to the nationality of the victim or the pirate. Law of March 3, 1819, ch. 77, § 4, 3 Stat. 510, continued in force by Law of May 15, 1820, ch. 113, § 1, 3 Stat. 600; *see also The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (interpreting 1819 statute providing for civil seizure of ships used for piracy). Recently, in the Torture Victim Protection Act, Congress provided both alien and citizen victims of torture with a civil cause of action for damages against their torturers regardless of the nationality of the torturer or the place where the torture occurred. Pub. L. No. 102-256, 106 Stat. 73 (1992); *cf.* 18 U.S.C. § 2333(a) (providing private right of action for treble damages to U.S. nationals injured as a result of international terrorism anywhere in the world).

In the realm of economic regulation, Congress has extended the reach of U.S. antitrust and securities laws to conduct engaged in abroad by foreign persons and entities. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 415, 416 (1987) (hereinafter "RESTATEMENT"). This Court and the courts of appeals have consistently upheld these assertions of extraterritorial jurisdiction. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (applying U.S. antitrust law to conduct abroad by foreign reinsurers); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (applying U.S. antitrust law to conduct abroad by foreign electronics manufacturers); *Itoba Ltd. v. Lep Group Plc.*, 54 F.3d 118 (2nd Cir. 1995), *cert. denied*, 116 S.Ct. 702 (1996) (applying U.S. securities laws to conduct abroad by British share-purchaser); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2nd Cir. 1972) (same). Indeed, it was "settled law" as early as 1945 "that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has

consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2nd Cir. 1945) (L. Hand, J.).

It is a well-established principle of international law that all States have universal jurisdiction to provide criminal and civil redress for extraterritorial conduct that violates fundamental norms of the law of nations, such as genocide, piracy and torture. *See United States v. Yunis*, 924 F.2d 1086, 1091-92 (D.C. Cir. 1991) (invoking universal jurisdiction over air piracy); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (invoking universal jurisdiction in extraditing suspected Nazi war criminal to Israel). For example, numerous international treaties recognize universal jurisdiction over the offenses defined by their terms.[9] Such universal jurisdiction over grave breaches of human rights and other international crimes reflects the status of such offenses as wrongs against the entire international community for which any state may pursue a remedy. *In re Barcelona Traction, Light and Power Company* (Belgium v. Spain), 1970 I.C.J. Rep. 3, 33 ("In view of the importance of the rights involved, all states can be held to have

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[9] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5(2), Dec. 10, 1984, SENATE TREATY DOC. No. 20, 100th Cong., 2d Sess., 23 I.L.M. 1027 (1984), 24 I.L.M. 535 (1985); Convention Against the Taking of Hostages, art. 5(2), T.I.A.S. 11081 (1985); Convention for the Protection and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, art. 3(2), 28 U.S.T. 1975, T.I.A.S. 8532 (1977); Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4(2), 22 U.S.T. 1641, T.I.A.S. 7192 (1971).

a legal interest in their protection"); RESTATEMENT § 404.[10]

In the context of this substantial body of law, the Courts of Appeals for each of the Second, Ninth, and Eleventh Circuits have interpreted the ATCA as one more means by which Congress has sought to remedy violations of the rule of law. There is no need for this Court to examine their conclusion that the ATCA reaches extraterritorial conduct that violates the most fundamental norms of international law.

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[10] In practice, federal courts have interpreted and given effect to international law in a wide variety of contexts, both procedural and substantive. For example, issues of foreign sovereignty have been addressed in cases involving the Foreign Sovereign Immunities Act, *see Argentine Republic v. Amerada-Hess Shipping Corp.*, 488 U.S. 428 (1989), and the Act of State Doctrine, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). International procedural issues have been considered in the context of the service of judicial documents abroad, *see FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980); *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); obtaining evidence in a foreign state, *see Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522 (1987); and enforcing foreign judgments, *see Hilton v. Guyot*, 159 U.S. 113 (1895). This Court has explicitly addressed the broader issues of statutory construction in light of international law standards, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and comity, *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). Substantive issues of international law have been addressed in the context of the acquisition and control of territory, *Jones v. U.S.*, 137 U.S. 202 (1890); the resolution of boundary disputes, *Iowa v. Illinois*, 147 U.S. 1 (1893); *Arkansas v. Tennessee*, 246 U.S. 158 (1918); questions of nationality, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); principles of war and neutrality and their effect on private rights, *The Steamship Appam*, 243 U.S. 124 (1917); *Dow v. Johnson*, 100 U.S. 158 (1879); and private property rights generally, *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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